90-81

No. ....

Supreme Court, U.S.
FILED
JUN 28
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI APPELLANT

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QUESTIONS PRESENTED

May the appellate court find that a lower court's decision was not clearly erroneous when the lower court's decision was based upon a conclusion of law which the appellate court correctly overturned, and may the appellate court then make new findings of fact as a sole basis for upholding the trial court's decision which new findings were contrary to the trial court's findings and the record?

May the appellate court make it's own findings of fact on a critical issue where such findings are contrary to the findings of the lower court and the record?

May the appellate court correctly make a conclusion of law in interpreting a

contract critical to a determination of the case which conclusion is contrary to the conclusion of law of the trial court and not find the trial court's conclusion clearly erroneous?

After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, did the appellate court then err in further failing to determine that the district court's findings were clearly erroneous where the district court, to the contrary, found that the plaintiff wrongfully assessed the defendants and therein breached its fiduciary duty to the defendants and acted in bad faith?

PARTIES TO THE PROCEEDINGS

The parties to the Cascade v. Banks et al., proceeding in both the United States District Court for the District of Utah and the Tenth Circuit Court of Appeals were:

CASCADE ENERGY AND METALS CORPORATION, a Nevada corporation,

Plaintiff-Appellee, Cross-Appellant

v.

JEFFERY G. BANKS, KENNETH CALDWELL, COASTAL COMPUTER INVESTMENTS, a California partnership, ELMER J. DAVIS, HARMATZ and HODOWSKI, a California partnership, DAVID G. HENRY, ROGER A. MANN, H.E. MOSES, ROBERT A. NICKERSON, PETER P. SAMARIN, HERBERT W. STOLTENBERG, EDWIN STOLTENBERG, CHRIS WAUGH, SAMUEL HARMATZ, BERNARD HODOWSKI, PATRICIA STOLTENBERG, MANN CALDWELL PARTNERSHIP, a partnership. DELFORD R. ASHLEY, GEORGE SLATER, PATRICIA SLATER, ROBERT DOUB, SAM HAMBARIAN, ALYCE HAMBARIAN, LIONEL ASCHER, A.C. NEJEDLY, R.E. DONAHEY, GRACE V. DUNCAN and ELLIOT WEINBERG,

Defendants-Appellants, Cross-Appellees.

JEFFERY G. BANKS, KENNETH CALDWELL, COASTAL COMPUTER INVESTMENTS, a California partnership, ELMER J. DAVIS, HARMATZ and HODOWSKI, a California partnership, DAVID G. HENRY, ROGER A MANN, MANN CALDWELL PARTNERSHIP, H.E. MOSES, ROBERT A. NICKERSON, PETER P. SAMARIN, PATRICIA STOLTENBERG, HERBERT W. STOLTENBERG, EDWIN STOLTENBERG, CHRIS WAUGH, DELFORD R. ASHLEY, GEORGE SLATER, PATRICIA SLATER, ROBERT DOUB, SAM HAMBARIAN, ALYCE HAMBARIAN, LIONEL ASCHER, A.C.NEJEDLY, R.E. DONAHEY, GRACE V. DUNCAN, ELLIOT WEINBERG, BERNARD HODOWSKI and SAMUEL HARMATZ,

Counterclaimants, Crossclaimants, Cross-Counterdefendants, Appellants, Cross-Appellees,

v.

CASCADE ENERGY AND METALS CORPORATION

Counterdefendant, Cross-Counterclaimant, Crossclaim Defendant, Appellee,

and

W. DAVID WESTON, TELEGRAPH MINE LIMITED, a partnership, REX MONTIS SILVER CO., TELEGRAPH MINE JOINT VENTURE, GOLD TECHNICS, LTD., JAMES F. PETERS, as TRUSTEE of the GNOLAUM UNITRUST,

Cross-Counterclaimants, Cross-Defendants, Crossclaim Defendants, Appellees, Cross-Appellants.

and

HAROLD MASUNAGA, MARION HARADA, UKIO AYABE, LYLE MULLER, CHARLES HIGASHI, JOSEPH GREEN, and WILLIAM Y. OHARA.

Amici Curiae.

Delano S. Findlay, Salt Lake City, Utah for Cascade Energy & Metals Corporation.

Richard A. Love of Reish & Luftman, Los Angeles, California and Ron Goss and Carolyn Montgomery of Van Cott Bagley, Salt Lake City, Utah for Jeffery G. Banks, Kenneth Caldwell, Coastal Computer Investments, Elmer J. Davis, David G. Henry, Roger A. Mann, Mann Caldwell Partnership, Robert A. Nickerson, Peter P. Samarin, Patricia Stoltenberg, Herbert W. Stoltenberg, Edwin Stoltenberg, Delford Ashley, George Slater, Patricia Slater, Robert Doub, Sam Hambarian, Alyce Hambarian, and Lionel Ascher (the "Associate Defendants") Samuel Harmatz, Bernard Hodowski, A.C. Nejedly, Chris Waugh, H.E. Moses, R.E. Donahey, Grace V. Duncan, Elliott Weinberg, and Harmatz and Hodowski partnership (the "Gold Technics Defendants")

W. David Weston Pro Se for W. David Weston

Ronald S. George, Pocatello, Idaho for Telegraph Mine Limited.
Lynn P. Heward, Salt Lake City, Utah for Rex Montis Silver Company
Delwin T. Pond, Salt Lake City, Utah for Gnolaum Unitrust and Amici Curiae.

The petitioner presents himself and his arguments Pro se before this Court of last resort with some trepidation, aware of the weighty matters of constitutional and other questions of law significant to the national need which are most generally presented for review. None the less petitioner has sought justice in the matter placed before the Court for over seven years, which in the term of a single life time is not an insignificant period, and prays that this Court of last resort will hear and act on petitioners prayer for relief in the interest of justice for just one of it's citizen constituents.

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TABLE OF AUTHORITIES

Cases:

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Stangle v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976).

U.S. - Equitable Life Assurance Soc. of U.S. v. C.I.R., 64 S.Ct. 722, 321 US 560, 88 L.Ed. 927, rehearing denied 64 S.Ct. 941, 322 US 767, 88 L.Ed 1593

Statutes:

28 U.S.C. § 1254(1)
28 U.S.C. § 1291
Revenue Code § 59(e)(4).

Miscellaneous:

C.J.S. Federal Courts 204(3).

Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc.

Supreme Court Rules Rule 10.1(a)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No.

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.
Defendants

PETITION FOR WRIT OF CERTIORARI

JURISDICTION ON WRIT OF CERTIORARI

Review of Writ of Certiorari... will be granted... (a) When a Federal Court of Appeals has rendered a decision... has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Supreme Court Rules, Rule

10.1(a).

OFFICIAL REPORTS OF OPINIONS BELOW

Cascade v. Banks et al, No. 86-1156, 86-1157, 86-1202 in United States Court of Appeals for the Tenth Circuit, the opinion is reported at 896 F.2d 1557

Cascade v. Banks et al., No. 82-C-1223C in the United States District Court for the District of Utah

GROUNDS FOR JURISDICTION OF THE COURT

The opinion of the Tenth Circuit Court of Appeals in the Cascade v. Banks, matter was dated February 16, 1990. Jurisdiction in the Appeals Court was based upon 28 U.S.C. § 1291. A petition for rehearing by cross-defendant W. David Weston was denied on April 25,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)[1]

STATEMENT OF THE CASE

In 1980 certain joint venture parties known as Associates subleased working interests in seven mining claims comprising a gold mine located in California known as the Telegraph Mine. The Associates had three business objectives 1. (a) Develop and (b) Operate a gold mining enterprise, 2. Sell gold for cash or take gold in kind, 3. Qualify a federal tax deduction early to offset risk. The Associates hired Cascade

[1] "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

Energy and Metals Corporation as their common "operating manager." The Associates obtained an $800,000 "development" loan to be used by their operating manager on a best efforts basis for "development purposes only" as that term is used in the mining industry. In late March of 1982 'development work' through the expenditure of the $800,000 had been completed and production commenced using a method known as heap leaching for extracting the gold from the ore.

During start-up production in April and May of 1982 there were some delays due to extremely bad weather and the operating manager assessed the Associates for the costs of production until profits from the sale of gold was sufficient to pay all production expenses. Some of the Associates paid the pro-

duction costs when assessed and others did not which frustrated and impeded the operating manager's ability to produce. None the less, by the end of October, 1982, 23,080 tons of ore had been mined, crushed and removed to the leach pad for final gold extraction. 504.67 ounces of gold had been extracted and sold for $175,233.87. 4790.87 ounces of gold remained under a continuous process of gold extraction which had a "contemplated" extractable value of $1,015,880 (gold at $344.98 pr/oz). By the end of October 1982 the Associates had been assessed $321,984.60 (pro rata 1/35 $9,199.56). The Associates formed a management committee in August 1982 to oversee the operating manager and ostensibly to collect the assessed amounts. In early October 1982 the

Associates management committee hired a professional mining engineer Mr. Martin Hughes to review the project operations. After a lengthy review Mr. Hughes reported to the committee:

> "This project has been initiated in a very good and effective manner. If, properly supported, it is now at the point of consistent operation and good results." (Exh. 229).

The dispute over payment of assessments which arose initially in September of 1982 culminated on December 2, 1982 when Associate Herbert Stoltenberg declared for the first time that the contract documents did not permit assessments beyond the $800,000 initial development loan. It was the opinion of the operating manager and the Associates who were paying the production assessments that the contract documents required the Associates to pay production costs for

mining and milling the ore out of their share of the **contemplated** gold production to be obtained when the ore was removed to a leach pad facility for final extraction. On December 15, 1982 Cascade Energy as Plaintiff initiated an action in the United States District Court for the District of Utah, known as Cascade v. Banks et al., No. 82-C-1223C to collect the unpaid assessments. The non paying Associates brought a cross-claim and counterclaims against the Lessors who also crossclaimed. The District Court acquired jurisdiction based on diversity of citizenship, the amount in controversy was in excess of $10,000 and some claims involved federal securities laws. The case commenced trial on October 9, 1985 and a final judgment was issued by the District

court in September of 1986. Thereafter the non-paying Associates appealed the decision of the district court to the Tenth Circuit Court of Appeals and the plaintiff and others associated with the lessors cross-appealed.

In it's decision the lower district court found as a conclusion of law (No. 7) that the contract documents did not provide for assessability beyond the initial development loan amount of $800,000 and that both Cascade and Weston, it's president, knew of that fact and acted in bad faith by maintaining the agreements provided for assessability.

> "7. The interests of the Associates in the sublease and claim were not assessable and Cascade willfully and wrongfully maintained that they were."

On the other hand the district court found the project was economically viable and might have a produced a profit

from the gold being produced during the period the Associates were in control of the property. The foundation for this Petition for Certiorari is a firm, explicit and correct conclusion of law made by the court of appeals, which overturned the conclusion of law made by the trial court as follows:

> "In our view, paragraphs 13(b) and 13(c), when read together, provided that the Associates **were required to pay additional development and production costs** out of their share of the **contemplated** gold production. Under the plain language of paragraph 13(c) -- which begins 'Notwithstanding anything to the contrary contained herein'-- the Associates are not responsible for additional payments beyond each associates share of the minerals that were actually produced and removed from the mine."(emphasis added) Cascade v. Banks 896 F.2d 1557, 1568

Thus, the appeals court found, the meaning of the agreement between the parties as to assessability was that the Associates were responsible for addit-

ional payments up to the value of their interest in the ore removed from the mine and hence that assessments were permitted for the "mining, milling and removal of ore" i.e "minerals that were actually produced and removed from the mine."

This conclusion of law by the appellate court was contrary to Conclusion of Law No. 7 made by the trial court on the same subject.

One of the vital **facts** found by the trial court was that the ore in place was economically valuable ore. It is so stated by the court:

> "I cannot find and have not found that the Telegraph Mine project with adequate financing...could not be economically viable. Indeed, I have already indicated my general acceptance of the reports of the geologists to the contrary." (D.C. Trial Transcript of March 27, 1985, p. 244.)

And also in finding no 116, p. 100:

> "The property does contain extensive deposit of ore that...might have been operated at a profit from the gold and silver produced therefrom during the participation of the defendant associates."

These findings were also supported by the report of engineer Martin Hughes to the Associates in October of 1982. (See page 6.)

Based upon it's conclusion of law that no assessments were warranted beyond the $800,000 development loan the trial Court made no findings generally with regard to the amount of gold then actually produced or then under production, but the record was replete with evidence of the amount of gold available for extraction in the ore on the leach pad and the amount of gold actually produced in bar form and sold.

The appeals court found that no gold was produced.[2] This finding was contrary to the district court's findings that the project was economically viable and the evidence in the record regarding the $1,015,880 value of the gold then under extraction on the leach pile and the $175,233.87 value of the gold sold. Based on its erroneous finding that no gold was produced, the appeals court made new findings to the effect that Cascade and Weston acted in bad faith knowing assessments were not warranted. These findings were contrary to the findings of the district court and the evidence in the record as noted which established that gold was produced.

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[2] Cascade v. Banks, supra, pgs. 1565, 1566, 1569, 1570.

To follow the appellate court's reasoning if gold bearing ore was produced, assessments as then warranted were required to finance continuing production costs in order to attain the objectives of the parties in entering into the agreements. As assessments were a necessary obligation to obtain the purposes of the Associates it only follows that a pro rata collection of assessments was necessary for the protection of the parties interests who had paid their assessments.

Thus, when taken together, i.e. i) the appellate court's ultimate **conclusion of law** that the parties' agreement allowed for assessments limited to the value of each Associates interest in the ore removed; and ii) the trial court's ultimate **fact** that the Associates

project was economically viable, supported by the evidence that valuable ore was being mined, milled and removed from the property for final gold extraction then valued at $1,015,880; that extracted gold in the amount of $175,233.87 had been sold; that the extraction of gold was increasing and continuous, it follows that the district court's findings that Cascade and Weston acted in bad faith in seeking collection of the assessed amounts was clearly erroneous.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY CONCLUDED THE AGREEMENTS PROVIDED FOR ASSESSABILITY, BUT, MADE ERRONEOUS NEW FINDINGS AS A BASIS FOR NOT REVERSING THE TRIAL COURT'S CONTRARY CONCLUSION THAT THE AGREEMENTS DID NOT ALLOW ASSESSMENTS

When taken together, the above ration-

al conclusion of law[3] by the appellate court that the contracts were assessable within certain limits, and the facts of this case regarding the value of the mine as found in the record and in the district court's findings,[4] are exactly what the parties originally intended to capitalize the production costs as

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[3] The interpretation of a contract is a question of law for the Court's determination Orson v. United States Fidelity and Guaranty Co., 157 P.2d 149 (Utah 1978).

[4] Geologists Dr. Mead LeRoy Jensen and Joseph Owens testified at the District Court trial. Dr. Jensen appraised the net value of the 540,000 tons of probable ore in place to be $41,000,000. He examined the property in 1981 and again in 1983. In his report to the Associates in 1981 he stated: "The volumes (72,000 measured tons) used by both (geologists) Ito and Owens are acceptable, therefore... assuming heap leaching ...$154.60/value per Ton x .75% extraction x 300,000 Tons = $34,785,000. The District Court in it's Finding 97 stated: "the preponderance of the evidence supports the substantial accuracy of the geologists' reports..."

necessary to produce a positive cash flow from profitable gold production. But, the trial court became distracted from it's findings as to the economic value of the ore. The court misapplied the meaning of the terms "development" and "production" in it's interpretation of the parties contracts.[5] The agreements required that these terms be defined by their usage within the mining industry (JOA ¶ 4). This the trial court did not do in arriving at it's contract interpretation and made an egregious error of creating a false conclusion of law as to the meaning of the agreements as to assessability, which the appeals court expressly corrected. But, then the

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[5] The parties contracts consisted of a "Joint Operating Agreement" (herein called "JOA") a "Sublease and Working Interest Agreement" and a "Management Committee" agreement.

appeals court, having corrected the law of the case regarding the agreements providing for assessability, proceeded to overrule the trial court's findings of fact and the evidence in the record as to the value of the ore in the mine and under extraction by demeaning its value. The new findings made by the appeals Court that little or no gold was produced appears to be a basis for it's decision to uphold the lower court's decision that Cascade and Weston had breached their fiduciary duty[6] by assess-

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[6] Trial Court Finding 117, Accounting Findings 11, 12, 13 and 18. The trial court found that Cascade, breached its fiduciary duty of good faith by seeking to impose liability on the Associates for the assessments and in bringing an action to collect the assessments. The court's finding of bad faith was premised on: 1) the contracts were non-assessable, 2) Cascade knew the contracts were non-assessable, 3) sometime, Cascade new production proceeds would not be enough to meet costs and the only means for continued operations was financing from the Associates beyond their contract

ing defendants when they knew that assessments were not authorized and thus acted in bad faith, as the appeals court found:

> "After reviewing the record here, we cannot say that the district court's finding that Weston and Cascade breached their fiduciary duties to the Associate Defendants is clearly erroneous."

Now the only way the appeals court could reach a decision that Weston and Cascade had breached their fiduciary duties and no assessments could be made, after having found that the agreements were assessable, was by finding that the ore was valueless, and it did this in the following expressions which are not supported by the trial court's findings or

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liability, 4) Cascade hoped the Associates would pay voluntarily, 5) when the Associates did not pay voluntarily, Cascade devised a theory of liability under the contracts.

the record and accordingly are not

factually accurate: App/dec pp. 10-12.

"By **September 1981**, the heap leaching method had not produced any gold...[7]

"Months passed... there was not much gold produced."

"By February 1982, the...loan had been consumed and still no gold production[8]

"By July 1982, there was still no gold."[9]

"Three Associates... sampled the leach pile... found that the pile had little gold in it and that Weston and Cascade

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[7] By September of 1981 "development" work was only half completed, no leach pad had been constructed and no production was contemplated.

[8] "Development work did not conclude until the end of March of 1982 and following initial leach testing "production" did not commence until April 1982.

[9] By July 31, 1982 11,710 tons containing at least 2459 OzAu/Tn was loaded on the leach pile (1770 Oz Au recoverable (72%) $601,800 at $340 Oz/Tn) See D.C. NR215. Regarding gold values See D.C. Exh. 91, 152, 900 901, 903 and 905.

had been mining low quality ore."[10]

"In September 1982... there was still no gold."[11]

"The associates... put limits on quality ore mined so they would not have to pay for Cascade's mining of low quality ore."[12]

That the foregoing characterization of

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[10] The Associates incorrectly sampled the leach pile by driving a pipe a few feet into the surface at an angle. The ore subsequently assayed had already been leached of gold as leaching commences first on the surface. The District Court found that these results were erroneous.

[11] By September 30, 1982 21,980 tons of ore was loaded on the leach pad containing 4594.75 ounces of gold and $145,188. of gold had been sold.

[12] See Trial Transcript. pg. 1845 and Trial Exhibit 152. Some members of the Associates Management Committee directed that gold production be limited to a gold content in the ore of .12 Oz/Au/Tn. The operator objected to this decision as unwise. Later in October Martin Hughes advised the Associates that this limit was unrealistically to high and would cause the loss of a substantial profit. Nevertheless the directive demonstrates the Associates believed they were obligated for production costs.

the facts is so egregiously erroneous is seen (1) in its being contrary to the finding of the trial court that the ore was valuable, (2) in the clear evidence in the record that gold was produced and significant amounts of gold were on the leach pad under extraction, (3) In the fact that production did not commence until April of 1982, the prior period being used for mine "development" only.

II. THE TRIAL COURT FAILED TO APPLY THE MINING INDUSTRY AND IRS DEFINITIONS OF "DEVELOPMENT" AND "PRODUCTION" AS REQUIRED TO INTERPRET THE JOINT OPERATING AGREEMENT ("JOA"); THE APPELLATE COURT IN NOT APPLYING THE DEFINITION OF THESE TERMS MADE ERRONEOUS NEW FINDINGS.

The JOA expressly required in ¶ 4 which spoke of "development" and "production" that the terms usage in the contracts be interpreted "as that term is used in the mining industry.

In the text "Public Land and Mining Law," written for the interpretation of mining law,[13] the industry terms "Development" and "Production" are defined as separate isolated events with distinct and segregated costing. The U.S. Internal Revenue Service similarly defines the terms for purposes of separating taxing events and require assessability in determining that the project was economically viable.[14] The mining industry definitions as set out below were ignored by both lower court's in their decision's regarding the

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[13] See applicable portions of the text Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc. in Appendix "B"

[14] Revenue Code § 59(e)(4). See Brooks v. Commissioner, 424 F.2d 116 and Getty Oil vs U.S. Government, 399 Fed 222,22; See Cascade Opening Brief Appendice "B" pge 28

contracts assessability.[15]

> "(c) **Development of Mineral Deposits.** Exploration work continues until general knowledge has been obtained of...general geological characteristics, and...grade of an ore deposit... Thereafter,...to study the... economic feasibility of producing the deposit. **All the steps after exploration and before production of minerals which are taken to block out, or define, the mineral deposit and to open a mine...are properly known as development work.**
>
> [**Production consists of] Extraction and processing**...For hardrock deposits, substantial investment is

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[15] See Cascade Energy & Metals opening brief pages 4-6 as set forth in Appendix B. The appellate court and the trial court's decision both incorrectly have development funds paying production costs? Appellate Decision pg 8-9 quotes the JOA ¶ 2(h),4,(no development loan money permitted for production costs.) "Cascade...to use... development loan to develop the mine...and prepare for gold production. Yet, inconsistently complains on Appellate Decision page 11, that no gold was produced during development. This inconsistency confuses the trial court's finding "that I learned quickly on that the mine could not be put into production for $800,000. By the Court's own admission the $800,000 could not be used for production costs! Only by mid March 1982 was the mine prepared for production.

> usually required for both extraction and processing...once the ore mineral is concentrated, it must usually undergo additional processing in order to isolate the useful mineral sought. Production of minerals may be by... surface mining [open pit], underground mining... Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc. (emphasis and explanation added)

By early 1980 exploration and feasability studies for an underground mine at Telegraph had been completed. The geology and grade of ore had been defined. Prior to July 1981, due to extraordinary hyper-inflation, the economic feasibility of the underground mining plan was in jeopardy. That the $800,000 loan was insufficient for underground development was communicated to the Associates at an Associate meeting in July 1981. At this meeting an alternate feasibility study was presented using a new technology called

"heap leaching" and upon their own motion approved by the Associates. This plan still required $800,000 for development expenses only. "Development work" under the new plan commenced when construction started on the mine camp, maintenance building, crushing plant, the open pit, heap leaching facilities and when applications for mining permits were prepared.[16] Development was completed in late March 1982 when the construction, preparation and permitting was complete. The project only then had been made ready for production. In accord with Industry, IRS and JOA ¶ 2(h),4 definitions all funds segregated for development were spent on development only.[4] These expenditures were

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[16] See District Court Trial Exhibit No. 66.

controlled by an Associates committee.[17] Production, i.e mining and crushing of ore; then started-up in April 1982. A positive cash flow was expected by the end of June 1982. Due to force majeure events (El nino weather) sufficient gold was not then able to be extracted from the ore on the leach pile by the end of June to pay continuing production costs. Thereafter, Associate delays in paying these production short-falls or not paying diminished cyanide levels in the leaching solution reducing gold recovery and delayed building the leach ore pile

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[17] Note: JOA ¶ 4 contractually requires the "Manager to **Develop** the Property...**as that term is used in the mining industry.**" See District Court Trial Exhibits No. 131.06/41.03 4/15/82. The Appellate Court in Ap/Dec footnote 7 gives Cascade sole signature authority over development funds and on App/Dec page 11 inconsistently gives Associates signature authority.

to its optimum production size.[18] None the less as noted herein significant amounts of gold ore was removed; gold was extracted and sold.

Accordingly all references by the lower court's to the payment of production costs through development expenditures is clearly erroneous. All references cited by the lower courts to the language "pre-development" as found in early correspondence were misnomers intending to be "pre-production" (same as "development"). "Pre-development" could only refer by definition to exploration or feasibility studies which were all completed.

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[18] See District Court NR215

III. CASCADE AND WESTON'S INTERPRETATION OF THE CONTRACT MADE THE OBJECTIVES OF THE ASSOCIATES POSSIBLE AND THE TRIAL COURT'S ERRONEOUS CONTRACT LAW FINDINGS AS WELL AS THE APPELLATE COURT'S ERRONEOUS NEW FACT FINDINGS MAKE THOSE OBJECTIVES IMPOSSIBLE.

Weston in early December of 1982 in response to an inquiry from Associate Coastal Computer Inc. regarding his interpretation of assessability wrote a lengthy letter setting forth his interpretation of the JOA provisions for assessability.[19] His interpretation as set forth in the letter was affirmed in the appeals court's findings regarding assessability. (See page 9)

The trial court found that the Associates were not liable for production costs. (Amend Conclusion of Law 7)

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[19] The letter dated December 14, 1982 entitled Interpretation of Contract Provisions "Constancy Amid Change" was addressed to Associate Coastal Computer Inv. and is found in Appendix "B".

The trial court interpreted paragraph 13(c) of the operating agreement that there was no liability for start-up production costs except as offsets to proceeds from production.[20] Both at the D.C. trial and on appeal Cascade and Weston contended that as specified in the contracts they were to be construed under Utah law.

Under Utah law the document is viewed in its entirety so all of its parts can be given effect in accordance with its overall purpose.[21] An interpretation that makes the contract possible and capable of achieving its purpose is

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[20] As a result the joint venture working interests were found to be nonassessable (D.C. Amend Findings No.s 36,37,66,103,104).

[21] Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980; Minshew v. Chevron Oil Co., 575 P.2d 192 (Utah 1978)

preferred.[22] Once interpreted, the court's obligation is to enforce the agreement without regard to the wisdom of a party entering into the agreement.[23] Weston further contended that liability for assessments was unambiguously expressed in ¶¶s 10(a), 13(a)(b) of the operating agreement ("JOA". The JOA provided that liability for costs of "mining", "milling" and costs of "ore removal" which are production costs, were an Associate obligation. But! that 13(c) placed a floor under the Associates liability for costs of mining uneconomical ore. Contrary to the trial court's interpretation of 13(c) Weston asserted that 13(c) did not negate

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[22] Stangle v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976).

[23] Skousen v. Smith, 27 Utah 2d 169, 493 P.2d 1003,1005 (1972)

liability expressed in 13(b) but, rather protected the Associates by restricting the Operator from charging for ore produced, which, when sold, was insufficient to recover production costs. Thus assessments could be made until cash flow was sufficient to pay for production. The Operator could not assess beyond the gross value of the Associates'interests in minerals mined, milled and removed to the leach pad and interests in proceeds due from the sale of gold. Weston argued that ¶ 10(a) of the JOA imposed liability above $800,000 loan amount which reads:

> "10. Compensation...of Operating Manager. The Purchasers agree that the Operating Manager shall be paid...
> (a) reimbursement of its out-of-pocket costs of... operating,... expense,...

Weston also contended the trial Court's interpretation should be rejected

because it defeated the purpose and objective of the contracts (production of gold) making them impossible to perform. The trial court erroneously also found the contracts to be impossible to perform where it found no financing for start-up production costs was provided for in the agreements, where some Associates were unwilling to voluntarily pay such costs. (Finding 116).

IV. THE APPELLATE COURT'S CONTROLLING LAW CONCLUSION INTERPRETING THE OPERATING AGREEMENT IS IN AGREEMENT WITH CASCADE'S AND WESTON'S INTERPRETATION, IS CONTRARY TO THE TRIAL COURT'S CONCLUSION OF LAW; HENCE THEY COULD NOT HAVE ACTED IN BAD FAITH IN ATTEMPTING TO COLLECT ASSESSMENTS.

As noted above Weston argued the $800,000 development loan was allocated and reserved to be spent for "development expenses only" and the contracts provided for assessability to pay for production expenses up to the value of

the gold in the ore removed for final gold extraction. As noted on page 9 above the appeals court similarly found the contracts provided for assessability.[24] The appeals court also said the Associates would have additional liability for production costs when minerals were removed from the property and would be required to make additional cash contributions based upon the contemplated gold production.[25] Untenably and in spite of all the foregoing, the

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[24] "In our view, paragraphs 13(b) and 13(c), when read together provided that the Associates were required to pay additional ...production costs out of their share of the contemplated gold production." ... "...the Associates are not responsible for additional payments beyond each Associate's share of the minerals that were actually produced and removed from the mine. (emphasis added). Cascade v. Banks, supra 1568

[25] See Cascade v. Bank, supra 1568 "to pay...production costs out of... **contemplated** gold production."

appellate court erroneously stated that no assessments were warranted because the project was not economically viable.

V. THE APPELLATE COURT'S NEW FINDINGS THAT THERE WAS LITTLE OR NO GOLD PRODUCED WAS CLEARLY ERRONEOUS AS GOLD WAS EXTRACTED AND SOLD AND A MAJORITY OF THE DEFENDANT ASSOCIATES FAILED TO PAY THE COSTS NECESSARY TO PRODUCE THE GOLD

Mining and milling of ore started in April of 1982. As set forth in Telegraph Mine Associates Fiduciary Accounting,[26] as provided the court and defendants by Cascade during the accounting phase of the D.C. trial "Management Operations Control Account No. 1001" and offsetting account "3002" entitled "Product (Gold) Sales from Operations," (See Appendix "B") by the end of October 1982 there was $175,233.87 available from the actual sale of gold extracted

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[26] See District Court NR 313.

from the ore by heap leaching and the rate of gold extraction was rapidly increasing.

The amount of $175,233.87 was expended as directed by the Associates Management Committee in the means to increase production and was not available to pay for past production costs.[27] Assuming, for sake of illustration, that the $175,233.87 constituted a break even cost in production. The pro rata share of the costs would have been $4,974.31 per Associate 1/35 working interest. By the end of October 1982 the defendant Associates had paid the following amounts.

Units	Defendant	Aug 31	Sept 31	Total
1	Banks		1,000	1,000
1	Coastal			0
1	Davis			0

[27] See D.C. trial transcript pgs. 1062-1067, D.C. trial exhibit 115A.)

1 Henry	4,200		4,200
1 Mann	2,000		2,000
1 Mann Caldwell			0
1 Nickerson			0
1 Samarin		5,000	5,000
1 E. Stoltenberg			0
2 H. Stoltenberg	1,400	2,400	3,400
1 Ashley		9,231	9,231*
1/2 Slater		2,307.75	2,307.75
1 Doub		9,231	9,231
1 Hambarian	9,258.31		9,258.31
1/2 Ascher		4,615.50	4,615.50
1/2 Waugh	4,516		4,516
1 H & H	4,500		4,500
Total			$59,259.56*

*Ashley later paid a total of $20.421.12 which provided a combined total of $70,449.68 as awarded by the trial court.

Even so, defendants Banks, Coastal Computers, Davis, Henry, Mann, Mann Caldwell Partnership, Nickerson, Ed Stoltenberg, H. Stoltenberg, Slater and Harmatz & Hodowski did not pay their share of the production costs of the ore mined, milled, removed and actually sold as determined to be assessable by the appeals court in it's controlling decision.

VI. THE CONTRACT DOCUMENTS DEFINE "PROPERTY" AS THE ORIGINAL SEVEN LEASED MINING CLAIMS WHICH STRADDLE THE ORE DEPOSIT, THERE WERE NO MILL SITE CLAIMS AND ALL ORE MINED AND MILLED WAS REMOVED FROM THE PROPERTY FOR FINAL GOLD EXTRACTION AND MET THE REQUIREMENTS OF JOA ¶ 13(c).

Upon execution of the Joint Operating Agreement only seven claims were leased[28] and only the Telegraph claim was mined. Mill site claims were later acquired by the Associates upon which to construct heap leach facilities for final gold extraction. All references to "Property" within the contract documents (JOA ¶ 13(c)) by contract definition can only mean these seven claims and in particular the Telegraph claim. JOA paragraph 13(c) references to "removed from the property" could only mean ore removed from it's in situ residence on

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[28] See District Court trial Exhibits 300, 303 and 301.

the Telegraph claim (or any of the other six mining claims). Mining i.e blasting and excavating, is a condition of ore removal. Crushing and agglomeration are conditions of milling. Accordingly the ore that had been mined from the Telegraph claim, crushed, agglomerated and removed from the "property" (i.e. Telegraph claim) to the mill site claims for final gold extraction fulfills all the contractual requirements imposed by 13(c) for assessability as found by the appeals court.[29]

By the end of October 1982 at least 23,080 tons of ore had been mined, crushed, agglomerated and removed to the

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[29] See exhibit of gold production as attached to the Affidavit of W. David Weston in Appendice "B" as derived from production records as submitted to appellate court and derived from reports, and exhibits submitted to the trial court.

leach pile for gold extraction. By the end of October 1982, 504.67 ounces of gold had been extracted worth $175,233.87. 4790.87 ounces of gold remained under continuous process of gold extraction which had a "contemplated" extractable value of $1,015,880 (gold at $344.98). To pay for the costs of mining, milling and removing this ore to the leach pad for final gold extraction by the end of October 1982, the Associates had been assessed $321,984.60 (pro rata 1/35 amount of $9,199.56).

CONCLUSION

The judgment of the court of appeals found in it's IV. Conclusions 1, 2 and 5 of the appellate court's Published Opinion should be reversed. The Court should grant what other relief it may find just.

The appellate court correctly overturned the trial court's conclusion of law regarding the non assessability of the parties agreements. The appellate court erred in not finding that the trial court's conclusion of law decision, that the agreements did not provide for assessability, was clearly erroneous.

The trial court is the appropriate fact finding court and the appellate court erred in making new findings of fact to the effect there was little or no gold at the Telegraph Mine which finding was contrary to the trial court's finding and the record.

After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, the appellate court then erred in not further determining

the district court's finding, that Cascade and Weston (in assessing the defendants) breached their fiduciary duty and acted in bad faith, was not clearly erroneous.

Neither Cascade or Weston could have acted in bad faith in assessing the Associate Defendants as they did not pay for the production costs "... of the contemplated gold production" or even the costs of producing the gold actually sold. Neither Cascade or Weston could have acted in bad faith in assessing the Associates as they were responsible under ¶ 13(b) and 13(c) for additional payments for each Associate's share of the minerals that were actually produced and removed from the mine. The Associate Defendants did not pay for the production costs as required by 13(c)

and those amounts that were paid should not be reimbursable as required by the trial court.

Respectfully submitted

W. David Weston
Pro Se

90-81

Supreme Court, U.S.
FILED
JUN 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. . . . .

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPENDIX "A - 1"
APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 86-1156, No. 86-1157, No. 86-1202

CASCADE ENERGY AND METALS CORPORATION
a Nevada corporation,

Plaintiff-Appellee, Cross-Appellant

v.

JEFFERY G. BANKS et.al.

Defendants-Appellants, Cross-Appellees

JEFFERY G. BANKS et.al,

Counterclaimants, Crossclaimants, Cross-Counter-defendants, Appellants, Cross-Appellees

v.

CASCADE ENERGY AND METALS CORPORATION

Counterdefendant, Cross-Counterclaimant, Crossclaim Defendant, Appellee,

and

W. DAVID WESTON et. al
Cross-Counterclaimants, Cross-Defendants, Crossclaim Defendants, Appellees, Cross-Appellants.
with Amici Curiae, HAROLD MASUNAGA et. al.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 82-C-1223C)

---

before MCKAY, BARRETT, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

This diversity case involves a dispute over a gold mine.

The basic controversy is between the mine's principal promoters (W. David Weston and his affiliated entities) and a group of investors in the mine.

The Weston entities basically appeal from the district court's determination after a bench trial that they breached theirfiduciary duties to the investors by concealing large cost overruns during the mine's development and by then trying to assess the investors for the overruns. The Weston entities also challenge the district court's decision to pierce the Corporate veil among the Weston entities and to nullify the investors, obligation to make additional payments on various promissory notes. The investors generally appeal From the district court's holding that their interests in the mine were not "securities" under Federal and state securities laws and that the Weston entities did not defraud the investors into purchasing their interests at the outset. We affirm in part, reverse in part, and remand.

Parties

Plaintiff Cascade Energy and Metals Corporation ("Cascade") is a Nevada corporation which owned and managed a gold mine. During the time relevant here, Weston owned or controlled over 50 percent of Cascade's stock and served as its president. Six other entities affiliated with Weston ultimately became parties to this lawsuit: Telegraph Mine Limited ("Telegraph Limited"), a Utah limited partnership having Cascade as its general partner; Rex Montis Silver Co. ("Rex Montis"), a Utah corporation, 41 percent of whose stock was owned by Weston; Interphase Corporation ("Interphase"), a Utah corporation, 77 percent of whose stock was owned by Weston; Gnolaum Unitrust, a revocable trust established by Weston for the benefit of himself, his wife, and his children; Gold Technics, Ltd. ("Gold Technics"), a California limited partnership having Rex Montis as its general partner; and Telegraph Mine Joint Venture, a joint

venture among Telegraph Limited, Rex Montis, and Gold Technics.

This case started when Cascade filed suit in the United States District Court for the District of Utah against various nvestors in the gold mine (the "Associate Defendants") seeking to assess them for additional capital contributions.[1], Cascade also sued eight limited partners of Gold Technics (the "Gold Technics Defendants") for allegedly interfering with the Associate Defendants' purported duty to pay additional capital assessments.[2] Another group of investors in the gold mine, who generally support Weston and Cascade in this litigation, are not parties but have been allowed to appear in this Court and below as amici curiae.[3] The Associate Defendants and the Gold Technics Defendants (collectively, the "defendants") counterclaimed against Cascade and brought additional claims against Weston and his af-

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1 The Associate Defendants are Jeffery G. Banks, Kenneth Caldwell, Coastal Computer Investments, Elmer J. Davis, David G. Henry, Roger A. Mann, Caldwell Partnership, Robert A. Nickerson, Peter P. Samarin, Patricia Stoltenberg, Herbert W. Stoltenberg, Edwin Stoltenberg, Delford Ashley, George Slater, Patricia Slater, Robert Doub, Sam Hambarian, Alyce Hambarian, and Lionel Ascher.

2 The Gold Technics Defendants are Samuel Harmatz, Bernard hodowski, A. C. Nejedly, Chris Waugh, H.E. Moses, R.E. Donahey, Grac e V. Duncan, Elliott Weinberg and Harmatz & Hodowski.

3 The non-party investors appearing as amici-curiae are Harold Masunaga, Marion Harada, Ukio Ayabe, Lyle Muller, Charles Higashi Joseph Green and William Ohara.

filiated entities.[4] Weston and his entities, in turn, counterclaimed against the defendants.

Background

The following diagram summarizes the relationships among the principal parties at relevant times:

(The Diagram is omitted do to space limitations.)

The following recitation of facts is based upon the district court's findings, which we cannot conclude are clearly erroneous.

In 1974, Cascade purchased the "Telegraph" gold mine, located in eastern California. In 1975, Cascade leased the mine to Telegraph Limited, a Utah limited partnership controlled by Weston having Cascade as its general partner. In January 1979, Telegraph Limited sold a 40 percent interest in the mine lease to Gold Technics for $150,000 ($50,000 in cash with the baiance in an installment note). Gold Technics is a California limited partnership established by two accountants (Bernard Hodowski and Samuel Harmatz) and a group of their accounting clients and Weston.

At that time, in January 1979, Telegraph Limited (as 60 percent owner) and Gold Technics (as 40 percent owner) entered into a joint venture, the Telegraph Mine Joint Venture (the "Joint Venture"), to develop the mine. Cascade served as the manager of the Joint Venture.

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4 When we refer to the "Weston entities," we mean Cascade, Telegraph Limited, Rex Montis, Gnolaum Unitrust, Interphase, and the Telegraph Mine Joint Venture. We do no include Gold Technics as a Weston Entity because, although Rex Montis is Gold Technics' general partner, essentially all of Gold Technics' limited partners are adverse to Weston in this litigation.

In September 1980, Gold Technics sold three-fourths of its 40 percent interest in the mine to Rex Montis for 480,000 shares of unregistered Rex Montis stock. After the transaction, the mine lease and the Joint venture were owned 60 percent by Telegraph Limited, 30 percent by Rex Montis, and 10 percent by Gold Technics. The transaction was contingent upon the completion the sale of 35 working interests in the mine to private investors and upon Rex Montis, compliance with California's regulations governing transactions in unregistered securities. However, Rex Montis never obtained approval of the sale from the California Corporation Commissioner and never physically conveyed the Rex Montis shares to Gold Technics.

In December 1980, the Joint Venture (through Cascade as manager) sold 35 undivided working interests in the mine to various individual and corporate investors. The investors collectively were known as the Telegraph Mining Associates (the"Associates"). As part of the transaction, the Associates agreed to hire Cascade (of which Weston was president) to develop andoperate the mine on the Associates' behalf. The Associatesfurther agreed to pay the Joint Venture, as sublessee of the mine, an "annual minimum royalty" of $74,285 per 1/35th unit, consisting of $30,000 in cash and a $44,285 recourse royalty note.[5] That amount, $74,285, was to be paid each year, regardless of whether there was any mineral production.[6] However, by the third year, "production proceeds" were supposed to pay all or most of the $74,285 per unit minimumroyalty payment.

The sale of the 35 units raised $1.05 million immediately, of which $800,000 was to be lent back to the Associates by

5 The transaction's underlying documents refer to this $74,285 payment as an"annual minimum royalty." The Associates paid the annual royalty to the Joint Venture, which held an exclusive sublease on the mine, for the right to mine minerals on the property.

6 In the first and second years, the $74,285-per-unit minimum royalty payment was to be paid with $30,000 in cash and a $44,285

the Joint Venture as a development loan. Cascade, acting as the Associates' project manager, was to use the $800,000 development loan to develope the mine for the Associates and to prepare the site for gold production.[7]

The Associates who purchased the 35 units fell generally into four groups: (1) person affiliated with Gold Technics, and their friends and acquaintances; (2) other persons who Weston solicited at a gold convention and elsewhere; (3) a group of Hawaiian investors who were participants in some of Weston's other enterprises (and who are not parties to this appeal but have filed an amicus brief stating their position); and (4) Weston himself and some of his affiliated entities, including his revocable trust, Gnolaum Unitrust. In this litigation, the first and second Associate groups are allied with Weston, and the third and fourth Associate groups are allied with him.

The offering memorandum for the 35 working interests contained charts showing income and cash flow projections. Those projections forecast that the Associates would never have to contribute additional cash to repay the promissory notes or the $800,000 development loan because by the third year, operating profits from the project would be more

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6 ....
promissorynote. For the third year and subsequent years, the Associaites were allowed to make the entire $74,285 payment with a promissory note in that amount. In other words, the Associates were required to amke $30,000 cash payments only in the first and second years.

7 The proceeds of the $800,000 development loan were deposited into an Associates' bank account for whcih Cascade, as manager of the project, had signature authority.

than enough to satisfy those obligations.[8]

However, problems with the mine arose almost immediately. The original plan was to sink a 400 foot shaft and engage in underground mining. The district court found that as of July 1981, Weston (as president of Cascade, the mine's operating manager) realized that the $800,000 development loan was not enough money to sink the shaft and to get the mine into production. (Accounting findings 14.) So, according to the district court, Weston implemented a plan for obtaining more mon from the Associates. Instead of beginning underground operation Weston persuaded the Associates to generate some quick profits b letting Cascade perform surface mining and then use a "heap leaching" method to get the gold out of the ore. In general, heap leaching entails piling up a mound of ore and soaking it with a cyanide solution, and then processing the gold-laden solution that gradually seeps out.

By September 1981, the heap leaching method had not produced any gold and some Associates started to get suspicious. Several Associates flew to Cascade's headquarters in Salt Lake City and inspected the books. Although they found some inconsistencies and evidence that Weston was using a portion of their money for his personal affairs, they were largely persuaded by his explanations and by his insistence that core samples showed that there really was gold in

---

8 The memorandum forecast that in 1981, 13,200 tons of ore would be be mined and milled, resulting in the production of over $3 million worth of gold and silver ($86,034 per 1/35th unit). The memorandum further porjected that in 1982, 52,800 tons of ore would be mined and milled, resulting in the production of over $12 million worth of gold and silver ($344,135 per 1/35th unit). Those projections were based on a gold price of $525 per ounce and a silver price of $15 per ounce. The same level of production and income predicted for 1982 was forecast for later years through 1991.

the ore. The Associates then set up a management committee to oversee the operation's finances. They instituted a two-signature check policy, requiring the committee's permission before Cascade wrote major checks.

Months passed. To make a long story short, costs kept escalating, production was delayed month after month, assays revealed that there was not much gold in the ore that Cascade spent its time surface mining, the heap leaching method never produced much gold, and Cascade rapidly consumed the $800,000 development loan with little or no gold to show for it and without even starting to sink a shaft. All the while, Weston kept telling the Associates that if they waited just a few more months and if they put just a little more money into the operation, the heap leaching system would produce some gold and the project would get off the ground.

By February 1982, the $800,000 development loan had been consumed and there was still no gold production. Weston informed the Associates that he and Cascade were loaning the project money to keep it afloat. He told the Associates that he was going to assess them for all of the "development costs" beyond the initial $800,000. The proposed assessments were in addition to the $74,285 minimum royalty payment which the Associates were obligated to make each year to the Joint venture. Weston started sending out assessment invoices. Some Associates paid the invoices, others did not. None of the Associates at that time raised the contention that assessments were not allowed under the Joint Operating Agreement. The district court found that many Associates who did their assessments did so not because they felt obligated to, but rather because they were told that they soon would be repaid from the promised gold production.

By July 1982, there still was no gold. Three of the Associates went to the mine and sampled the heap leaching

pile themselves. After assaying the samples, they found that the pile had little gold in it and that Weston and Cascade had been mining poor-quality ore. Meanwhile, the assessments kept building.

In August 1982, Weston held an Associates meeting and insisted that the Associates pay their assessments. He told them that the project had to have more money and could become profitable with just 60 more days of heap leaching. (Exh. 83-A, meeting transcript at 25, 30-31.) Some Associates paid their assessments after that meeting, others did not.

In September 1982, the Associates ordered Weston to stop crushing ore because the crushing operation was the biggest expense and there still was no gold. The Associates sought to put limits on the quality of ore mined so that they would not have to pay for Cascade's mining of low-quality ore.

In November 1982, the Hawaiian investors (who were associated with some of Weston's other ventures) withdrew their consent from the Associates' management committee that had been formed to represent the Associates' interests. The management committee then disbanded for lack of a majority.

In December 1982, the Associates (other than the Hawaiian Associates and the Weston - affiliated Associates) informed Weston that under the Joint Operating Agreement, the Associates could not be assessed for additional development or production costs beyond the initial $800,000 development loan. Cascade then filed suit in the district court against the Associates who had not paid their assessments (that is, the Associate Defendants). The Associate Defendants counterclaimed against Cascade and brought third-party claims against Weston and the other Weston entities for Fraud, breach of fiduciary duty, and

securities violations. Then essentially everyone counterclaimed and cross-claimed against everyone else.[9]

After a lengthy bench trial on liability issues and a later bench trial on accounting issues, the district court held in substance that: (1) Weston and his entities had not defrauded the Associates into buying their working interests; (2) the Joint operating Agreement did not permit the assessment of the Associates for additional cash needs beyond the initial $800,000 development loan; (3) after the working interests were sold, Weston and his entities had breached their fiduciary duties and had acted in bad faith by concealing the fact that there was no way for the mine to be put into production for only $800,000 and by trying to extract additional cash from the Associate Defendants through so-called assessments; (4) Weston and his entities had misappropriated large sums from the Joint Venture and had converted the Joint Venture's funds for their own use; and

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9 There was some confusion below over whether the defendants' claims against Weston and the other Weston entities besides Cascade should be denominated "third-party claims" or "counterclaims" or "cross-claims." The district court noted that defendants' claims technically were not third-party claims because "no indemnity or judgment over was thereby sought pursuant to Rule 14, Fed.R.Civ.P." (Findings 17 n.1) Rule 14 allows a "defending party, as a third-party plaintiff," to sue a"person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." The trouble is that in a technical sense, defendants' claims also are not counterclaims or cross-claims because Weston and the other Weston entities were not yet parties to the action at the time defendants' claims were filed. Rule 13, Fed.R.Civ.P., provides that a "counterclaim" is a "claim against any opposing party" and that a "cross-claim" is a "claim by one party against a co-party." In substance, the defedants' claims are in the nature of separate lawsuits that have been consolidated with Cascade's action. There is no question that all of the claims asserted below

(5) Weston, Cascade, and Weston's other entities were alter egos of each other.

As a remedy, the district court ordered that: (1) Weston and Cascade account for $628,474.63 in funds misappropriated from the Joint venture (thus giving cold Technics, as a 10 percent owner of the Joint Venture, $62,947.46); (2) Weston and Cascade return $70,449.68 in assessments wrongfully collected from the Associate Defendants; (3) Weston and Cascade pay $265,000 in attorneys fees to the Associate Defendants for bringing the meritless suit to assess them for additional mining costs ($240,000 to the Associate Defendants and $25,000 to those of the Gold Technics' Defendants who were Associates); (4) the Associate Defendants' working interests be terminated and the Associate Defendants' working of any further obligation to make royalty payments or to perform on the promissory notes given for past royalty payments; (5) the Associate Defendants be relieved of any obligation to repay the $800,000 development loan; (6) the Joint venture be terminated and dissolved, and Gold Technics and its limited partners forfeit all interest in the mine lease and the Joint Venture; (7) Weston and Cascade pay Gold Technics $5,000 as nominal damages for the "wrongful frustration and de facto termination" of the Joint venture; (8) Gold Technics be terminated and dissolved, and all damages and stock owed to Gold Technics ($62,847.45 in damages from the accounting, $5,000 in nominal damages, and the 480,000 Shares of unregistered Rex Montis stock held by Rex Montis but belonging to Gold Technics) be distributed directly to Gold Technics' limited partners in proportion to their interests. Because of the district court's alter ego finding, the judgments against Weston, Cascade, and the other Weston entities ran against each of them.

Issues On Appeal

Weston, Cascade, and the other Weston entities raise the following issues on appeal:

1. Whether the district court erred in holding that the Joint operating Agreement between the Associates and Cascade did not require the Associates to make any cash capital contributions for development and production costs beyond the initial $800,000 development loan.

2. Whether the district court erred in holding that Weston and Cascade breached their fiduciary duties to the Associate Defendants by learning early on that the mine could not be put into production for $800,000, concealing that fact, and thenattempting to assess the Associate defendants for additional capital.

3. Whether the district court erred in holding that Weston and Cascade had failed to account for large sums that Weston and Cascade allegedly misappropriated from the Joint Venture.

4. Whether the district court erred in holding that Telegraph Limited, Rex Montis, Interphase, and Gnolaum Unitrust all were alter egos of Weston and Cascade.

5. Whether the district court erred in relieving the Associate Defendants of all liability for future mine royalty payments and for promissory notes given for past royalty payments.

6. Whether the district court erred in holding that the Associate Defendants were relieved of all liability for the $800,000 development loan which the Joint venture had made to the Associates from the proceeds of the working-interests sale.

7. Whether the district court erred in awarding attorneys' fees to the Associate Defendants for the alleged bad faith of Weston and Cascade in filing suit to assess the Associate Defendants for additional cash capital contributions.

8. Whether the district court erred in holding that the

Associate Defendants and the Gold Technics Defendants did not engage in any tortious conduct or breach any fiduciary duties owed to Weston's revocable trust, Gnolaum Unitrust (which owned one of the 35 working interests), or to the other Weston entities.

The Associate Defendants (and those of the Gold Technics Defendants who also are Associates) raise the following issues on appeal:

1. Whether the district court erred in holding that the 35 working interests in the mine sold to the Associates were not securities under federal and California securities laws.

2. Whether the district court erred in holding that Weston and his entities were not liable for fraud or negligent misrepresentation in the offering of the 35 working interests.

3. Whether the district court erred in holding that the Associates could not recover from the Weston entities for adverse tax consequences stemming from the failure of the mining operation.

The Gold Technics Defendants raise the following issues on appeal:

l. Whether the district court erred in refusing to rescind Gold Technics' September 1980 sale of a 30 percent interest in the mine to Rex Montis in exchange for 480,000 shares of Rex Montis stock.

2. Whether the district court erred in failing to award damages for the conversion of 38,000 shares of Rex Montis stock which belonged to Gold Technics but which Weston had pledged to a bank for a loan to Cascade.

3. Whether the district court erred in failing to award additional damages for the termination of the Joint venture.

4. Whether the district court erred in Failing to award any monetary compensation to one of cold Technics' limited partners, R.E.Donahey

Discussion

I. ISSUES RAISED BY WESTON ENTITIES

A. Assessments Under Operating Agreement (Weston Entities' Issue No. 1)

The district court held that the Joint operating Agreement between the Associates and Cascade did not require the Associates to make a ny cash capital contributions for development and Production costs beyond the initial $800,000 development loan. We agree.

Paragraph 13(c) of the Agreement specifically limited the Associates' liability for additional payments to each Associate's Share of the minerals that were actually produced and removed from the mine:

> Notwithstanding anything to the contrary contained herein, the Operating Manager [Cascade] shall have no authority, express or implied, to enter into any commitment or obligation on behalf of the Purchasers [that is, the Associates] or otherwise do anything which would subject the Purchasers, or any of them, to any liability in excess of the Purchasers' respective interests in the minerals mined, milled and removed from the Property and their interests in any proceeds from the sale of said minerals. (Emphasis added.)

In other words, pursuant to paragraph 13(c), the Associates could not be required to make additional cash contributions to the enterprise when no gold was produced.

However, Weston argues that the Agreement's prior paragraph, paragraph 13(b), which provided that the Associates were liable for all costs of the mine, obligated the Associates to make additional cash contributions:

> All costs and liabilities incurred in the exploration and development of the Property and the mining, milling and removal of ore therefrom shall

be borne and paid for by the Purchasers in proportion to their interests.

In our view, paragraphs 13(b) and 13(c), when read together, provided that the Associates were required to pay additional development and production costs out of their share of the contemplated gold. Under the plain language of paragraph 13(c) -- which begins "Notwithstanding anything to the contrary contained herein" -- the Associates are not responsible for additional payments beyond each Associates share of the minerals that were actually produced and removed from the mine.

That interpretation of the Agreement is confirmed by parole evidence heard by the district court" Although Weston testified that he thought cash assessments were proper under paragraph 13(c) (See, e.g., Tr. 415-20), the lawyer who drafted the Agreement (who had been hired by Weston to handle the legal work for the transaction) testified that paragraph 13(c) was intended to mean what it said: the Associates could not be assessed under the Agreement for additional cash contributions beyond the value of the minerals produced. (Williams Dep. at 64-66.) Thus, as the district court held, Weston's assertion that the project collapsed because the Associate Defendants wrongly failed to pay the additional cash assessments, is without merit. The Associate Defendants were under no obligation to do so under the express terms of the Agreement.

B. Breach of Fiduciary Duty (Weston Entities' Issue No. 2)

The district court held that Weston and Cascade breached their fiduciary duties to the Associate Defendants by quickly learning early on that the mine could not be put into production for $800,000, concealing that fact, and then attempting to assess the Associate Defendants for additional capital. (Findings 100-01.) In particular, the district court held that Weston (as Cascade's president) acted in bad faith

by trying to Squeeze additional money from the Associate Defendants for a project that Weston knew was not economically feasible. The district court found that Weston did not start out with fraudulent intentions, but that by at least July 1981, Weston knew that the project could not be successful without more cash beyond the $800,000 development loan, and he embarked upon a scheme to get it:

> Adhering to my interlocutory findings concerning the good faith of Weston in connection with the original offering in reliance upon the existing reports of geologists and his analysis of and projections from them as to underground operations, I am now clearly Convinced that Weston's bad-Faith conduct had its inception on or prior to the writing of July 28, 1981, and that a breach of Cascade's implied covenant of fair and honest dealing as a fiduciary toward the Associates continued from that time to and including the institution of the Present action .... (Accounting Findings 14-15.)

Our standard for reviewing the district court's factual findings in an action tried without a jury is whether the findings are clearly erroneous. Fed. R. Civ. P. 52(a). In applying that standard, we are required to give "due regard . . . to the opportunity of the trial court to judge . . . the credibility of the witnesses." Id. After reviewing the record here, we cannot say that the district court's finding that Weston and Cascade breached their fiduciary duties to the Associate Defendants is clearly erroneous.

The following evidence supports the district court's finding that Weston and Cascade acted in bad faith in trying to assess the Associate Defendants.

First, the Joint Operating Agreement is clear on its face. See Part I.A above. Cascade had no power to subject the Associates to any liability in excess of their "respective interests in the minerals mined, milled and removed from

the Property." (Agreement 13(c); emphasis added.) If no minerals were removed from the property, then the Associate Defendants could have no additional liability.

Second, Weston filed suit seeking the assessments knowing that the lawyer who principally drafted the Agreement and who was responsible for the basic structure of the transaction, Lawrence Williams, had stated that the Agreement prohibited any cash assessment of the Associates. on December 2, 1982, before the lawsuit was filed, one of the Associates wrote a letter to Weston's attorney and to Weston stating that Williams had confirmed "in no uncertain terms that the agreements do not -- repeat -- do not give-Cascade or anyone else the right to demand assessments from the Associates." (Exh. 131.04.) Weston filed suit nonetheless.

Third, the breach of fiduciary duty by Weston and Cascade also was evidenced by their failure to reveal promptly and candidly that the $800,000 development loan was not sufficient to get the mine into production. Sometime before the $800,000 was exhausted, Weston and Cascade were obligated to step forward and tell the Associate Defendants that: (l) the offering Memorandum's projection that $800,000 was sufficient to sink a 400 foot mine shaft and to get the mine into production was wrong; (2) additional capital was required to make the project succeed; and (3) the Associates had various options, such as borrowing money, selling additional working interests, making additional capital contributions, or terminating the project. Weston and Cascade revealed none of those things, but instead sought to impose upon the Associate Defendants their mandatory-assessment theory -- which happened to be the solution that was most favorable to Weston and Cascade -- while continuing to mouth the increasingly frail hope that gold production was just around the corner.

Fourth, as the district court held, Weston's bad faith was

shown by the fact that as early as July 1981, Weston was recharacterizing certain key definitions in a way that would support his later argument that the offering documents contemplated a gap between the mine's development phase and the production phase, during which time the Associates assumed unlimited cash liability. In particular, although the offering documents consistently described the $800,000 loan as a "Development Loan," Weston's July 1981 correspondence with the Associates started calling it a "pre-development loan." See Exh. 39, July 28, 1981 letter to Associates. Moreover, although the offering memorandum's financial projections defined "Preproduction Expenses" to be all funds necessary "to place the Telegraph Mine at Production Phase," and stated that those expenses were to total $800,000 (see Financial Projections, Note D), Weston's July 1981 pro forma divorced "preproduction expenses" from the $800,000 figure and showed them continuing long after production was to begin. See Exh. 45.

Fifth, when Weston first suggested that the Associates should contribute additional cash to the project, he portrayed the requests not as mandatory assessments, but rather as voluntary, short-term loans to be repaid quickly from gold production. On April 15, 1982, Weston wrote a letter to the Associates notifying them that the "pre-development loan funds plus the interest accrued thereon has now been expended in the work of pre-development." (Exh. 41.03.) The letter stated that the Associates would be "invoiced directly" for future "production expenses," and that each Associate's share of the expected gold production would be sold to pay the billings if the invoices were not paid in cash:

> (Unless arrangements are made to pay for the costs of mining and processing, royalties, taxes, and such other expenses as are incurred in the

> operation, the costs of mining will be billed to [the Associates] directly on a quarterly basis and sufficient ounces of the production necessary to cover these costs will be sold. Id.

Thus, as the district court held, the "first mention of assessability for the cost of production" was not grounded on the mandatory nature of the assessments, but rather "on the theory that if not paid, deficiencies would be taken care of out of the sale of the gold." (Findings 54.) Weston was still proffering that view as late as August 1982 when, at an Associates meeting, Weston displayed some small souvenir bars of gold from the first production of the mine and stated that they would be distributed to those Associates who paid their second quarter assessments billings. Weston did not resort to his view that the assessments were mandatory, in late 1982, until his attempts at coaxing largely failed. Those facts indicate that Weston did not really think that the assessments were mandatory when Cascade sued the Associate Defendants for payment.

In summary, we by no means are holding that a fiduciary's decision to press an arguable contract interpretation that turns out to be incorrect constitutes a breach of fiduciary duty. We hold only that there was sufficient evidence to support the district court's finding that Weston's interpretation of the contract was patently wrong, that Weston knew it was wrong, that Weston concealed that fact from the Associate Defendants, and that Weston pushed the interpretation nonetheless in order to benefit himself and Cascade at the expense of those to whom he owed a fiduciary duty. Those actions constituted a fiduciary breach.

C. Accounting Issues (Weston Entities' Issue No. 3)

The district court held that Weston and Cascade and certain other Weston entities misappropriated or otherwise failed to account for $629,474.63 belonging to the Joint venture. The district court's accounting concerned the

misappropriation claims of only the Gold Technics Defendants and not those of the Associate Defendants.[10]

There is no dispute that Cascade, as managing agent of the Joint Venture, owed the venturers the duty to account properly for all sums entrusted to it. Nor does Cascade dispute that once Gold Technics established its right to an accounting, the burden of proof shifted to Cascade to show how the Joint venture's funds were expended and to establish any credits to which Cascade might be entitled. Cf. Restatement (Second) Trusts 172 comment b at 377 (1959).

After a full trial concerning the accounting, the district court held that Weston and Cascade had not provided adequate explanations for their handling of the five items listed above totalling $629,474.63.[11]

On review, we must uphold the district court's accounting findings unless they are clearly erroneous. Fed, R. Civ. P. 52(a).

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10 Just as the Gold Technics Defendants alleged that Weston and Cascade had misappropriated large sums of money from the Joint Venture, the Associate Defendants alleged that Weston and Cascade had misappropriated or mismanaged money belonging to the Associates. The district court did not address the Associate Defendants' accounting claims because (1) the only money allegedly squandered or taken from the Associates was part of the initial $800,000 amount that the Joint Venture had loaned to the Associates, and (2) the district court had nullified the Associate Defendants' obligation to repay that loan, thereby mooting the issue.

11 Cascade's accounting was suspicious from the start. Although the district court ordered Cascade to provide a full accounting prepared according to Generally Accepted Accounting Principles (R. 300 at 2; Accounting Tr. 168.), Cascade's accounting was not prepared by an accountant but by Weston himself. Although Weston consulted an accountant while preparing the accounting and enlisted an accountant to review Cascade's bookkeeping procedures generally, the accounting was neither audited nor

We agree with the district court that Cascade has failed to meet its burden of proof on four of the five accounting issues. Indeed, as discussed below, the evidence presented at trial showed that Weston regularly dipped into the Joint venture's checking account whenever one of his entities needed cash, and that he freely shuffled cash among his various entities with essentially no contemporaneous documentation.

1. $35,843.73 depreciation expenses

In his original Affidavit Attesting Plaintiff's Fiduciary Accounting, Weston swore that $36,943.73 of that money was spent for "Depreciation." (R. 310 at 5.) The Gold Technics Defendants then submitted interrogatories asking how any part of the Joint venture's cash possibly could have been spent on a non-cash item such as depreciation. In response, Weston filed an amended affidavit in which he allocated the $36,943.73 to two other line items in his accounting, $28,156 to "other"" and the remainder to "Offering Expense." (R. 321 at 2.)

At the accounting trial, Weston was given the opportunity to explain how he had transformed $36,943.73 of "depreciation" into cash expenditures and why the newly-found cash expenditures were not included in his original accounting. (Accounting Tr. 44-48.) We agree with the district court that Weston's explanations were inadequate. He provided no itemization of the $28,156 that he allocated to "other." (Id. at 46.) He described his increasing of the "offering expense" category as an after-the-fact "adjustment that I felt went to the offerIng expenses." (Id. at 48.) When the district court pressed Weston on the issue of whether his new figure for offering expenses comported with the amount listed as a deduction on Cascade's 1980 tax return, Weston conceded that he did not know and had not checked. (Id. at 48 - 49.) The district court properly ordered Weston and Cascade to repay the $36,943.73.

2. $335,722.20 transfer to Cascade and Interphase

In its response to defendants' various accounting interrogatories, Cascade submitted its December 31, 1981 balance sheet showing that Cascade owed the Joint venture $305,041.01 as of that date. (R. 322 Exh. "Assoc. #23.") That $305,041.01 item was listed on the balance sheet as a note payable from Cascade to the Joint venture.

At the accounting trial, Weston admitted that Cascade and other Weston entities had taken large sums from the Joint Venture but argued that (l) in the case of Cascade, they totalled $270,200.00 and not $305,041.01_ and (2) they constituted capital distributions that need not be reimbursed. The district court held that (l) Cascade's debt to the Joint venture was $305,041.01 and that Cascade had not adequately justified its contention that it owed only $270,200.00: (2) there was an additional $30,681.89 (which was listed on Cascade's balance sheet as owing from Interphase to Cascade) that Cascade did not demonstrate came from sources other than the Joint Venture;[12] and (3) Cascade's "failure to account for the foregoing charges on the theory of 'capital distributions' is an improper and self-serving attempt to avoid accountability for the balances Cascade and the other Weston entities owe" (Accounting Findings 22).

On appeal, Cascade asserts, first, that the district court should not have relied on Cascade's corporate accounting records because they "were prepared for Cascade and not the [Joint venture] and because they "were not received into evidence and were not a part of the court's file." (Cascade

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12 The amount shown on the balance sheet was $78,417.89. The district court apparently found that $47,736.00 ($78,417.89) less $30,681.89) was a carry forward from 1980 and thus was not attributable to the Joint Venture. See Accounting Tr. 90-91.

Br. at 45.) Those contentions are without merit. The fact that Cascade's balance sheet was prepared for Cascade is not relevant to the issue of whether it evidences a bonafide debt owing from Cascade to the Joint Venture. Cascade's assertion that the documents were not properly before the court is belied by the record. Cascade itself filed the documents with the district court as an exhibit to its accounting responses. (R. 322 Exh. "Assoc. #23.") Weston testified about the documents at length during the accounting trial. E.g, Accounting Tr. 87, 151-52. Moreover, the district court invited Cascade to present any clarifying evidence that it had, but Cascade chose not to do so. (Accounting Tr. 183-84, 305-06,) Second, with regard to the $30,681.89 that the district court found owing to the Joint Venture from sums transferred between Interphase and Cascade, Cascade merely responds on appeal that "Cascade's ledger account Mo. 2105 'Interphase N/P' is unrelated to the [Joint venture]." (Cascade Br. at 45; see also Rex Montis Br, at 18.) Cascade does not provide any record citation for its assertion that the $30,681.89 did not come from the Joint Venture. The record shows that Cascade caused large amounts of money to be transferred from the Joint Venture checking account to Cascade. (R. 322 at 69.) Cascade, in turn, issued numerous checks to Interphase in round-number denominations, such as $1000, $5000, or $10,000. (R. 322 at 82-83; Accounting Tr. 87.) Cascade had hired Interphase to handle the accounting and payroll affairs of Cascade, the Joint Venture, and Weston's other entities. The sums transferred from Cascade to Interphase were transferred either without any invoices being prepared at all or with invoices being prepared after the transaction had taken place. (Accounting Tr. 97.) The funds were transferred into one of Interphase's bank accounts and commingled with the other funds there. (Id. 125.) It was Cascade's burden to show that all funds transferred between Cascade and Interphase were

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not related to the Joint venture or else were spent on legitimate Joint venture expenses. Cascade failed to do so.[13]

Third, Cascade asserts that much of the money that Cascade and the other Weston entities took from the Joint venture can be explained as capital distributions. The district court found that explanation to be an after-the-fact rationalization, and we agree. Cascade argues that in February 1981, the Joint Venture issued two checks totalling $40,949 to or for the benefit of Gold Technics. Cascade contends that the $40,949 given to Gold Technics as 10 percent owner of the venture was a capital distribution and that, consequently, Telegraph Limited as 60 percent owner was entitled to $270,200 and Rex Montis as 60 percent owner was entitled $91,807.55. (Cascade Br. at 45-45.)[14]

Contrary to Cascade's contention, the evidence at the accounting trial showed that (1) neither the 1980 nor the

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13 In its interrogatories to Cascade about the accounting, Gold Technics specifically asked Cascade to "[s]tate the reason for each of these expenditures by Cascade to Interphase 'On Account.'" Cascade chose not to provide a detailed response. Instead, Cascade stated that the expenditures were "[i]n payment for contract services" and referred to two ledger accounts. (R.322 at 82-83.) Weston admitted at trial that because Interphase's funds were commingled with funds recieved from Cascade and because invoices often were not created until after the fact (if at all), there was no way to determine from the ledgers what the funds actually were spent for. (Accounting Tr. 108-09.)

14 Cascade's capital-distribution explanation makes little sense on its face. First, Cascade and Interphase had no capital interest in the Joint Venture and thus could have no interest in any capital distributions. Telegraph Limited was the 60 percent owner of the Joint Venture, yet the transfers went not to Telegraph Limited but to Cascade and Interphase. Second, even if Cascade and Interphase (through Telegraph Limited) were entitled to a capital distribution, Cascade's number do not add up. If Gold Technics as

1981 tax return for the Joint venture, both of which were prepared by Cascade, reported the $40,949 payment to Gold Technics as a capital distribution (Accounting Tr. 55-57): (2) neither the 1980 nor the 1981 financial statement of the Joint venture, both of which were prepared by Cascade, treated the $40,949 payment as a capital distribution (Accounting Tr, 58-59); (3) one of the checks involved in the $40,949 transaction indicated on its stub that $12,255.88 was a repayment to Gold Technics for money advanced by it as part of the Associates' offering (Accounting Tr. 65); (4) another of the checks involved in the transaction indicated on its stub that the remaining $28,723.16 was a loan (Accounting Tr. 68-69;_ R. 322 Exh. THV7); and (5) Gold Technics' 1981 financial statement, which was prepared by Weston's accountant, treated the $28,723.16 as a loan (Accounting Tr. 73-74) . Therefore, the district court was justified in concluding that Gold Technics had not received any capital distributions and that all money taken from the Joint venture by Cascade and the other Weston entities should be returned.[15]

3. $81,308.40 transfer to Interphase

In 1981 Cascade caused the Joint Venture to transfer $81,308.40 to Interphase in order to pay for the construction of Interphase's office building. (Accounting Tr. 155.) on appeal, Cascade's only explanation for the transfer is that it constituted a capital distribution, although Cascade nowhere explains how Interphase, which had no ownership

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15 On appeal, Rex Montis argues taht if the $28,723.16 was a loan to Gold Technics, then Cascade and Rex Montis were entitled to an offset in that amount. (Rex Montis Br. at 20.) We agree that Gold Technics is obligated to repay all outstanding debts owed to the other parties in this action, subject to any defenses that Gold Technics might have. The district court should address that issue on remand.

interest in the Joint venture, could ever be entitled to a capital distribution. In any event, for the reasons stated in Part I.C.2 above, Interphase and the other Weston entities were not entitled to any capital distributions from the Joint Venture. Because the only explanation offered by Interphase is not supportable, the district court properly ordered Cascade and Weston, who improperly authorized the transfer, and Interphase to repay the $81,308.40.

4. $10,500 transfer to Rex Montis

In November 1981, Cascade caused the Joint venture to transfer $10,500 to Rex Montis. At trial, Weston's only explanation for the transfer was that it was a capital distribution. (Accounting Tr. 201: R. 322 at 69.) for the reasons stated in Part I.C.2 above, Rex Montis was not entitled to any capital distributions and must repay the money that it took. The district court properly ordered Cascade and Weston, who improperly authorized the transfer, and Rex Montis to return the $10,500.

5. $165,000 owed for defaulted Associate interests

The district court held that Cascade had not accounted for $165,000 in royalty payments that Cascade and Interphase owed to the Joint venture in connection with Cascade's 1982 purchase of 4 1/2 units of defaulted Associate interest and Interphase's purchase of one defaulted unit. In Cascade's response to Gold Technics' accounting interrogatories, Cascade produced photocopies of checks and bank records showing that it indeed had paid $135,000 into the Joint Venture"s bank account and that Interphase had paid $30,000. (R. 322 Exh. "TJY 13.")

On appeal, the Gold Technics Defendant do not challenge Cascade's assertion that checks totalling $165,000 were deposited into the Joint Venture's bank account, but rather contend that Cascade failed to submit "any evidence of the source of the fundspurportedly transferred." (Gold Technics Br. at 9, emphasis in original.) The Gold Technics

Defendants ask rhetorically, "what 'payment' is there if $135,000 of the Associates' or [the Joint venture's] funds are taken by Cascade and then checks written by it back into [the Joint Venture]" (Id.) Despite Gold Technics' point, we conclude that the $629,474.63 awarded by the district court double-counts the $165,000. The $165,000 payment could have come from only two sources: either from the Joint venture or from non-Joint venture sources (or a combination thereof). If it came from non-Joint Venture sources, then the Joint venture is entitled to receive only $464,474.63 ($629,474.63 less $165,000) because only $464,474.63 was wrongfully transferred from the venture. on the other hand, if the $165,000 came from the Joint Venture, then the venture still is entitled to only $464,474.63 because $165,000 of the $628,474.63 taken from it was repaid. Therefore, because the evidence shows that Cascade and Interphase in fact paid $165,000 to the Joint Venture, the accounting award should be reduced from $629,474.63 to $454,474.63, and the Gold Technics Defendants should receive their proportionate share of the smaller sum.

D. Corporate Veil Issue (Weston Entities' Issue No. 4)

The district court held that Weston and the entities affiliated with him were alter egos of each other and were jointly and severally liable for the entire judgment in this case:

> Interphase, Gold Technics, Telegraph Mine Ltd., Telegraph Mine Joint Venture, Cascade, Gnolaum Unitrust, and Rex Montis are instrumentalities of Weston which were and are used by Weston for his own personal purposes. Weston disregarded the purported separateness of the entities and commingled the funds of the entities and his own. He dominated their boards of directors and management, and has been and is able to single-handedly transfer assets from one entity to another and to

> and from himself as he chooses, with the acquiescence and consent of all. It would be inequitable and a fraud on the opposing parties if any judgment against Weston, Cascade, or Rex Montis were not also against these alter ego entities. Accordingly, the judgments to be awardedherein or balances due, restitution, damages and costs and attorney fees should run not only against Cascade and Weston but against Interphase, Telegraph Mine Limited, Rex Montis and Gnolaum Unitrust.

(Accounting Finding 35 as amended Nov. 19, 1985 emphasis added.)

At the outset, we need to distinguish between what the district court held regarding corporate veil issues and what it did not hold. First, as we read the district court's findings, the district court did not pierce the corporate veil of Cascade itself, largely because it had no reason to do so.16 The district court held that both Cascade and its principal officer and shareholder were primarily liable for breaching fiduciary duties owed to the Associates and to the Joint venture. See, e.g., Accounting Findings 25-27 ("[T]he judgents to be awarded herein . . . run not only against Cascade and Weston, but against Interphase, Telegraph Mine Limited, Rex Montis and Gnolaum Unitrust") (emphasis added). The district court held Weston liable because he personally directed and participated in Cascade's fiduciary breaches. See Restatement Second of Torts 874 comment c at 300(1977) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tort subject to liability for the harm thereby caused").

Second, the district court held that Rex Montis and three

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16 At the time of trial, Cascade was a publicly traded company having approximately 1200 shareholders. (Accounting Tr. 362).

other Weston entities -- Interphase, Telegraph Limited, and Gnolaum Unitrust -- were alter egos of Weston and were liable for the entire judgment against Weston and Cascade. Although the district court did not explain its exact reasoning, the court apparently adopted a variant of the "reverse piercing" theory which led to the peculiar result of holding the corporation liable for the debts or torts of its controlling shareholder rather than the other way around.17

Here, the district court held that Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust all were liable for what Weston had done. Although we agree that each of those entities should be responsible for any wrongs that it committed and for any money that it took, we do not agree that those enterprises had no entity status separate from Weston.

Under Utah law, two circumstances must exist before a corporate entity can be disregarded:

17 A "reverse piercing" claim is when "a corporate insider, or someone claiming through him, attempt[s] to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.") Fletcher Cyc. Corp. 47.70 at 458 (1983). Utah has addressed that theory only once, and it characterized that theory as "little recognized." Messick v. Phd Trucking Service, Inc., 678 P.2d 791, 793 (Utah 1984). The application here is a variant because it is not an insider who seeks to meld the stockholder and the corporation into one; rather it is an outsider who is asserting that theory.

> (l) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979).18

l. Evidence supporting piercing regarding Rex Montis, Interphase, Telegraph Limited and Gnolaum Unitrust

The district court's decision to "reverse pierce" the entity veils of Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust was based on three key factual Findings: (l) Weston dominated the boards of directors and the management of the four entities; (2) Weston was "single-handedly" able to transfer assets among the various entities and did so; and (3) Weston commingled the funds of the

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18 This case raises the issue of whether the standards for piercing a corporate veil should be determined by the law of the corporation's state of incorporation or by the law of the state whose substantive law applies to the case generally. Compare 17 Fletcher Cyc. Corp. 8326 at 120 (1987) ("[T]he liability of a stockholder for corporate debts and the extent and character of that liability are to be determined by the law of the state under the laws of which the corporation was created...") with 13A Fletcher Cyc. Corp. 6228 at 90 (9184) ("Where a corporation is formed in one state for the purpose of doing business in another state, its stockholders will be held liable in accordance with the laws of the latter state in so far as doing business transacted there is concerned"). See also, e.g., Jefferson Pilot Broadcasting co. v. Hilary & Hogan, Inc., 617 F.2d 133, 135 (5thCir. 1980) (applying law of state of incorporation to corporate veil issue); RRX Industries v. Lab-Con, Inc., 772 F.2d 543, 545-46 (9th Cor. 1985) (applying law of state where contract was breached to corporate veil issue even though corporations were incorporated in other states); Restatement (Second) Conflicts 307 at 328 (1971) ("The local law of the state of incorporation

various entities, in the sense that when he transferred funds from one entity to another, the funds were deposited in the receiving entity's general bank account and were mixed with other funds there. (Accounting Findings 26.)

Having examined the record, we conclude that the district court's specific factual findings about how Weston operated his entities are justified. Weston wielded almost total control over the entities. That control was evidenced particularly by his control over each entity's finances. The record shows that Weston freely transferred cash from any entity that had it to any entity that needed it, whenever he wanted to do so. See, e.g., Accounting Tr. 290, 292, 311-12.

There is no question that Weston's bookkeeping system made it nearly impossible to provide defendants with a precise accounting. The district court properly concluded that, because the transferred funds were commingled with

18 ...cont. will be applied to the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.") (emphasis added); id. 297, comment c at 291. However, because of the peculiar circumstances of this case, we need not resolve the general issue of what law applies to corporate veil questions. The four entities whose veils were pierced here -- Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust -- all are Utah entities. Cascade is a Nevada corporation but, as noted above, its corporate veil has not been pierced. Much of the wrongdoing in this case occurred at Cascade's headquarters in Utah. The only other state having substantial contacts with this litigation is California, where the mine is located and where many of the defendants reside. However, none of the parties specifically argues that California law applies to the corporate veil issue. Moreover, California's standard for piercing the corporate veil does not appear to be materially different from Utah's. Compare Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979) with Automotriz Del Golfo De California v. Resnick, 47 Cal.2d 792, 306 P.2d 1, 3

were commingled with existing funds of the receiving entity, "it was and is impossible to trace individual dollars From source to use." (Accounting Findings 9.) But the issue is whether those facts constitute sufficient grounds for disregarding the entity status of the entities in this case.

2, Piercing Analysis

We believe that a Utah court would not reverse pierce the entity veils of Rex Montis, Interphase, Telegraph Limited and Gnolaum Unitrust for a variety of reasons.

First, corporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities. See generally Dockstader v. Walker, 510 P.2d 525, 528 (Utah 1973) ("ordinarily a corporation is regarded as a legal entity, separate and apart from its stockholders"); McCulloch Gas Transmission Co. v. Kansas-Nebraska Natural Gas Co., 768 F.2d 1199, 1200 (10th Cir. 1985) ("The standards for the application of alter ego principles are high, and the imposition of liability notwithstanding the corporate shield is to be exercised reluctantly and cautiously.")(quoting 1 Fletcher Cyc. Corp. 41.10 (Rev. Vol. 1974), emphasis added); G. Henn & J. Alexander, Laws of Corporations 146 at 347 (1983) ("limited liability is one of the principal objectives of incorporation").

Second, this case largely involves "reverse" piercing, and it is far from clear that Utah has adopted the doctrine of "reverse" piercing, much less this particular variant of "reverse piercing," Messick v. PHD Trucking Service, 678 P.2d 791, 793 (Utah 1984) does discuss the "reverse pierce" concept, calling it "little- recognized theory," but the Utah court ultimately declined to pierce the corporate veil there because of the failure to prove the traditional piercing the corporate veil elements of l) non- observance of corporate formalities, 2) resulting in fraud, injustice or inequity. Thus,

the court did not decide whether it would have pierced the corporate veil in the reverse context had those elements been present. The reverse-pierce theory presents many problems. It bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets. Moreover, to the extent that the corporation has other non-culpable shareholders, they obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder who is determined to be the corporation's alter ego are subject to attachment. See 1 Fletcher Cyc. Corp. 41.20 at 413 (1988 Supp.) ("[A] necessary element of the [alter ego] theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege -- the doctrine cannot be applied to prejudice the rights of an innocent third party."). Absent a clear statement by the Supreme Court of Utah that it has adopted the variant reverse piercing theory urged upon us here, we are inclined to conclude that more traditional theories of conversion, fraudulent conveyance of assets, respondeat superior and agency law are adequate to deal with situations where one seeks to recover from a corporation for the wrongful conduct committed by a Controlling stockholder without the necessity to invent a new theory of liability.

Third, the analysis of corporate veil issues is different in a consensual transaction, such as a breach of contract case, than in a nonconsensual transaction, such as many tort cases:

> The issues of public policy raised by tort claims bear little relationship to the issues raised by a contract claim. It is astonishing to find that this

> fundamental distinction is only dimly perceived by many courts, which indiscriminately cite and purport to apply tort precedents in contract cases and vice versa.

Hamilton, The Corporate Entity, 49 Tex. L. Rev. 979, 984-85 (1971). The obvious difference between consensual and nonconsensual transactions is that the claimants in consensual transactions generally have chosen the parties with whom they have dealt and have some ability, through personal guarantees, security agreements, or similar mechanisms, to protect themselves from loss. For example, the fact that a company is undercapitalized can be overcome in many contractual Settings, because the parties can allocate the risk of financial failure as they see fit. But in nonconsensual cases, there is "no element of voluntary dealing, and the question is whether it is reasonable for businessmen to transfer a risk of loss or injury to members of the general public through the device of conducting business in the name of a corporation that may be marginally financed." Id.

Although breaches of fiduciary duty can be analyzed using tort principles (see Restatement (Second) of Torts 874 at 300 (1977)), the relationships among the parties in this case were basically voluntary and contractual. Cascade undertook the contractual obligation to manage the affairs of the Joint Venture and of the Associates, and consequently assumed the fiduciary duty of loyalty and duty of care inherent in any principal-agent relationship. See Restatement (Second) of Agency 1, 379, 387 (1958). The upshot is that Utah courts, like Courts generally, appear less likely to pierce a corporate veil when a consensual, contract-like transaction is involved than when a nonconsensual, tort-like transaction is involved. See, e.g., Centurian Corp. v. Fiberchem, Inc., 562 P.2d 1252, 1253 (Utah 1977) (piercing not allowed in sales contract dispute)_ Dockstader v. Walker,

510 P.2d 526, 528 (Utah 1973) (piercing not allowed in employment contract dispute).19

Fourth, although Weston obviously used his entities to further his personal objectives, just as corporate parents often use their subsidiaries to achieve corporate goals, weston held the entities out to the world as separate organizations. No one disputes that Weston's entities were validly organized and that de jure formation requirements were met. Indeed, Rex Montis was a publicly held company with over 850 shareholders. (Accounting Tr. 352,) The entities filed separate tax returns. E.g., Accounting Tr. 354-S5. The entities held separate shareholder and director meetings. E.g., Exh. 381, Notice of Rex Montis Shareholders Meeting: Accounting Tr. 362-63. In sum, besides Weston's transfers of funds among his entities, the district court made no finding that the entities did not maintain the external incidents of separateness.

Fifth, even if Weston's entities failed to comply with all of the formalities that they should have and even if Weston did freely transfer funds among the entities, the claimants here have not shown how their injury was connected with the entities' commingling or lack of formalities or how the claimants relied on the entities' separateness or the lack thereof. As the Utah corporate-veil test demonstrates, it is not enough to declare that two corporations or a corpora-

19 See generally 1 Fletcher Cyc. Corp. 41.85 at 460 (1983) ("Courts have generally been more likely to disregard the corporate entity in tort cases than in cases in contract ... "); F. Easterbrook & D. Fischel, Limited Liability and the Corporation, 52 U.Chi. L.Rev. 89, 112 (1985) (discussing economic justification for treating tort and contract cases differently for corporate veil purposes); Edwards v. Monogram Indus., 730 F.2d 977, 980-84 (5th Cir.1984) (en banc) (discussing distinction between tort and contract cases for corporate veil purposes).

tion and its prime shareholder are not really separate. The claimant must show that recognition of the corporate form would "sanction a fraud, promote injustice, or [produce] an inequitable result." Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979).

But the "injustice" or "inequity" on which a piercing claim is based cannot stem from the mere existence of limited liability, which is a legitimate characteristic of the corporate form. Rather, the "injustice" or "inequity" to the claimant must be connected with the lack of separateness between the corporation and its controlling stockholder and the failure to observe corporate formalities. Here, the defendants' losses generally had little to do with the Weston entities' lack of corporate formalities. Although there was commingling of funds among the various Weston entities, all the parties knew that they were separate entities and Weston maintained the corporate formalities of each entity separate from the others. The acts of commingling may have been acts of conversion, breach of fiduciary duty or the like, but there was no misrepresentation of the corporate stature of the entities with whom the various investors dealt. For example, the evidence showed that Cascade misappropriated roughly $300,000 from the Joint venture and that Rex Montis misappropriated about $10,000. See Part I.C above. Cascade plainly is obligated to return the $300,000 and Rex Montis must return the $10,000. But there is no reason to make Rex Montis responsible for repaying the $300,000 taken by Cascade. That result would be a windfall to the Joint Venture.20

20 Although Rex Montis is not responsible for the money that Cascade took from the Joint Venture, Cascade is responsible for the approximately $10,000 that Rex Montis took. The reason is that Cascade, in its capacity as manager of the Joint Venture, breached its fiduciary and contractual duty owed to the Joint Venture by wrongly authorizing the $10,000 transfer to Rex Montis.

We note that to the extent Weston or Cascade have an ownership interest in the entities, that interest may be susceptible to attachment by creditors. Thus, Cascade's 50 percent interest in Telegraph Limited may be subject to levy. Likewise, Weston's 22 percent interest in his trust, Gnolaum Unitrust, may be reachable by his creditors.

3. Conclusion on piercing issue

We hold that Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust are not jointly and severally liable for defendants' damage award against Weston and Cascade. We affirm the district court's holding that Rex Montis is liable in its own right for having taken $10,500 From the Joint venture. Likewise, we agree that Interphase is liable in its own right for having taken $111,990.29 ($30,681.89 plus $81,308.40) from the Joint venture. On remand, the district should determine whether Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust are directly liable for breaching any other duties owed by them (provided the defendants properly raised those grounds below).

E. Associate Defendants' Liability On Promissory Notes (Weston Entities' Issue No. 5)

The district court held that although the Associate Defendants could not recover any of the cash that they had paid to the Joint venture for royalty payments ($30,000 per 1/35th unit in both 1980 and 1981), they were relieved of any obligation to pay the promissory notes that they had given to the Joint venture as royalty payments ($44,285 per 1/35th unit in both 1980 and 1981). We affirm that holding. The promissory notes given by the Associate Defendants were clearly given in exchange for promises that were materially breached. Those uncured, material breaches discharged the Associate Defendant's duty to render further performance, including payments not yet made on their promissory notes, Restatement (Second) Contracts 232 (Illustrat-

ion 4), 237, 242 (1981).19

F. Associate Defendants' Liability For Development Loan (Weston Entities' Issue No. 6)

The district court held that the AssociateDefendants were relieved of all liability for repayment of the $800,000 development loan which the Joint venture had made to the Associates from the proceeds of the working-interest sale. For the same reasons that we affirm the ruling discharging the Associate Defendant's liability on the promissory notes in Part I.E, we similarly affirm the ruling of the district court discharging the Associate Dependant's from any liability to repay the $800,000 development loan.

G. Attorneys' Fees (Weston Entities' Issue No. 7)

The district court awarded the Associate Defendants attorneys' fees for Cascade's bad faith in suing the Associates for additional cash capital contributions. Utah law expressly permits an award of attorneys' fees for actions not brought in good faith. Utah Code Ann. 78-27-56 (allowing award of "reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith"). We do not think that the district court abused its discretion in awarding attorneys' fees here, and consequently, we affirm that ruling,

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19 Additionally, the record adequately supports the findings of the district court that, to the extent equitable relief was sought, that Cascade and the joint venture were barred by the doctrine of unclean hands from receiving relief pertaining to the collection of the royalty notes or development notes. (Findings 121)

H. Alleged Fiduciary Breach By Associate Defendants and Gold Technics Defendants (Weston Entities' Issue No. 8).

The district court rejected Gnolaum Unitrust's claims that certain of the Associate Defendants and the Gold Technics Defendants were liable to Gnolaum Unitrust for breach of fiduciary duty, breach of contract, breach of partnership duty, fraud, and tortious interference with business relationships. see Gnolaum Br. at 6. The district court held basically that the Associate Defendants had no duty to pay assessments under the operating Agreement (see Part I.A above) and that the defendants had not engaged in any tortious conduct toward Gnolaum Unitrust or the other Weston affiliates. (Findings 95, 114.) After reviewing the record, we do not believe that the district court's findings on this issue are clearly erroneous.

II. ISSUES RAISED BY ASSOCIATE DEFENDANTS

A. Whether Working Interests Were Securities (Associate Defendants' Issue No. 1)

The Associate Defendants contend that the 35 working interests sold by the Joint venture were securities[20] under

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20 In 1980, when the working interests were sold, Section 2(1) of the Securities Act provided in pertinent part: The term "security" means any note, stock, treasury stock, bond, debenture, ... investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interests in oil, gas, or other mineral rights, or in general, any interest or instrument commonly known as a security"...15 U.S.C. 77b(1) (emphasis added). In 1980, Section 3(a)(10) of the Securities Exchange Act provided in pertinent part: The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security" ... 15 U.S.C. 78(c)(10) (emphasis added). Calif. Corp. Code Section 25019 provides in pertinent part: "Security" means any ... certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease...

the statutory definitions in Section 2(l) of the Securities Act of 1933 (15 U.S.C. 77b(l)), Section 3(a)(10) of the securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)), and Section 25018 of the California Corporations Code. We agree.

The district court's April 1985 ruling on this issue predated the Supreme Court's decision in Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985). In Landreth,the Supreme Court held that when an instrument falls "plainly within the statutory definition" of a security, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the [federal securities] Acts apply." Id. at 690.[21]

Each of the 35 units sold here consisted of "an undivided one-thirty-fifth (l/35) working interest in the Mining Claims." (Exh. l, Attachment C, Working Interest Agreement at l.) As such, each of the 35 working interests Plainly constituted a "fractional undivided interest in . . . mineral rights" under the Securities Act of 1933, a "certificate of interest or participation in [a] . . . mineral royalty or lease" under the Securities Exchange Act of 1934, and a "certificate of interest or participation in [a] . . . mining title or lease" under the California securities statute. Therefore, because there is no ambiguity in the statutory definitions involved here and because there was no evidence that the 35 working interests were anything other than what they purported to be, we conclude that the working interests are "securities" under the state and federal statutes. See Penturelli v. Spector, Cohen, Gadon & Rosen, P.C., 779 F.2d 160, 164-67 (3d

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21 Although the Court in Landreth dealt only with the definition of the term "stock," the phrase "fractional undivided interest in oil, gas, or other minerals rights" and the phrase "certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease" appear equally susceptible to plain meaning.

Cir. 1985) (under Landreth analysis, "fractional undivided working interests" in coal mine were securities).[22]

Consequently, we reverse the District Court's ruling that the Associate Defendants' interests were not securities and we remand the case to the district court for resolution of the Associate Defendants' securities claims.[23]

B. Fraud or Negligent Misrepresentation (Associate Defendants' Issue No. 2)

The district court held that there was no actionable fraud or negligent misrepresentation in the initial offering and sale of working interests in the mine. The Associate Defendants point to various facts which they assert support a finding of fraud or negligent misrepresentation by Weston. The district court concluded that those facts did not support a finding of liability because the alleged misstatements and nondisclosure were not material or they were not made with the requisite scienter or they were not relied upon by the

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22 Accord Adena Exploration, Inc. v. Sylvan, 860 F.2d 1242, 1249-50 (5th Cir. 1988) (oil and gas working interest was security); Cf. U.S.Industries v. Touche Ross & Co., 854 F.2d 1223, 1233 (10th Cir. 1988) ("Because it is undisputed that the shares purchased by HI in the present case bear all the indicia of stock, we conclude that they are securities within the meaning of the federal securities laws"); Because we believe that the standards of Landreth are met here, we need not reach the issue of whether the 35 working interests also are securities because they are "investment contracts" under Securities and Exchange Comm. v. W.J. Howey Co., 328 U.S. 293 (1946).

23 We express no opinion concerning the merits of those securities claims or the various defenses to them raised by Weston and his entities. Nor do we express an opinion as to whether the district court's findings concerning the Associate Defendants' fraud and negligent misrepresentation claims (see Part II.B below) affect the securities claims. We note that the clear and convincing standard of proof applicable to common law fraud claims (See Finding 85) is higher than the standard for claims under 10(b) of the Securities

Associate Defendants. See Findings 78-87.

The Associate Defendants have not demonstrated to us that the district court's findings concerning Weston's alleged fraud and negligent misrepresentations are clearly erroneous. Thus, we affirm the district court's ruling on those issues.

C. Recovery For Adverse Tax Consequences (Associate Defendants' Issue 3)

The Associate Defendants contend that the district court erred in failing to allow them recovery for adverse tax consequences allegedly caused by the misconduct of Cascade and Weston. In response, Cascade asserts that the Associate Defendants "have failed to show that any adverse tax rulings they received were a direct result of either fraud or breach of fiduciary duty." (Cascade Reply Br. at 14.) The district court made no express findings concerning the adverse tax consequences allegedly suffered by the Associate Defendants.[24]

From the record and rulings of the district court, we are unable to determine the basis for the district court's denial of damages for adverse tax consequences. We can theorize at least three possible grounds for the district court's decision: (l) the district court may have held that damages for adverse tax consequences are not allowable as a matter of law: (2) the district court may have concluded that the Associate Defendants had not proved the elements of their claim for those damages, such as the existence of the damages or a causal connection between the damages and

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24 But see Findings 114 ("Except by the foregoing findings otherwise indicated, the issues of fact raised in the pleadings or reserved in the pretrial order are determined against the party or parties having the burden of proof with respect to them, the Court hereby finding that the evidence in support of them is insufficient.")

the wrongdoing of Cascade and Weston; or (3) the district court may have concluded that the Associate Defendants did not properly raise and preserve the issue in the Pretrial order or at trial.

On remand, the district court should make express Findings concerning its reason for denying the Associate Defendants' claim for damages stemming From adverse tax consequences. We note that at least one circuit court has indicated that tax consequences may potentially be considered in computing damages in certain circumstances. See Sharp v. Coopers & Lybrand, 649 F.2d 175, 189-91 (3rd Cir. 1981) (investors in tax shelter could recover damages for fraud including damages associated with fraudulently promised tax benefits), cert.denied,455 U.S. 938 (1982), overruled on other grounds, In e Data Access Systems Securities Litigation, 843 F.2d 1537, 1550 (3rd Cir.) (en banc) (implicitly overruling Sharp on statute-of-limitations issue), cert. denied, 109 S.Ct 131 (1988); but cf. Randall v. Loftsgaarden, 478 U.S. 647, 666-67 (1986).

III. ISSUES RAISED BY GOLD TECHNICS DEFENDANTS

A. Sale of 30 Percent Interest To Rex Montis (Gold Technics Defendants Issue No. 1)

The gold Technics Defendants contend that the district court erred in refusing to award them rescision in connection with Gold Technics' September 1980 sale of a 30 percent interest in the mine lease to Rex Montis in exchange for 480,000 Shares of Rex Montis stock. Under the Purchase Agreement, Rex Montis expressly agreed to convey 480,000 Rex Montis shares to Gold Technics in exchange for a 30 percent interest in the mine lease and Rex Montis' appointment as general partner of Gold Technics:

> Rex Montis agrees, subject to the warranties, conditions and terms of this Agreement as made by Technics and Technics Limited Partners, to convey to Gold Technics Ltd., as full consideration for the

above referenced purchase, 480,000 shares of its common capital stock . . . .

(Exh. 308, Purchase Agreement at 2.) Rex Montis further warranted that the "[s]hares of common stock of Rex Montis deliverable pursuant hereto, when issued and delivered, will be validly issued and outstanding shares of the common stock of Rex Montis Silver Company." (Id. at 3.) In addition, Rex Montis agreed that "[i]n the event the transaction contemplated by this Agreement or any part thereof is subject to the review or approval of any governmental agency or department having jurisdiction in the state of California, or otherwise, Rex Montis agrees to bear any and all costs required by such review or approval." (Id. at 6.)

Rex Montis never conveyed or delivered the 480,000 Rex Montis shares to Gold Technics. It did not do so in part because the shares were unregistered and Rex Montis could not obtain the California Corporations Commission's approval of the transaction as required by California law. See Calif. Corp. Code 25110, 25113.

Although, this might ordinarily provide grounds for recision, Restatement (Second Contracts 372-73 (1981), the district court refused to order recision here because it concluded that Gold Technics was barred by doctrines of waiver, unclean hands, and the failure adequately to tender back to Rex Montis the consideration and benefits it had received. Gold Technics failure adequately to exercise its recision rights under the California Corporation Code, which controlled the transfer of Rex Montis' stock. Calif.Corp. Code. 25110, 25113, 25507. The affirmative

defenses found by the district court bar a common law right to recision. We have reviewed the record and can not say that the district court's finding of fact with regard to these affirmative defenses was clearly erroneous. Accordingly, we affirm the holding refusing to grant recision to Gold Technics.[25]

B. Conversion of 38,000 Shares of Rex Montis Stock (Gold Technics Defendants' Issue No. 2

The Gold Technics Defendants contend that the district court improperly failed to award it $18,000 in damages against Cascade, Rex Montis and Weston for their conversion of 38,000 shares of Rex Montis stock belonging in equity to Gold Technics. The district court did specifically find such a conversion, Accounting Findings 28, and it did award damages of $18,620 against Rex Montis and for the benefit of Gold Technics, ltd. apparently as a result of this conversion. Accounting Findings 32. Although the damages were not specifically mentioned again in the district court's conclusions of law, Accounting Conclusions of Law 6, we think it is clear that Gold Technics was awarded such damages. We remand so that the district court may also enter judgment against Cascade and Weston for this amount.

C. Damages For Termination Of Joint Venture (Gold Technics Defendants Issue No. 3)

The Gold Technics Defendants contend that the district court erred in awarding them only $5,000 for the termination of the Joint venture. The Gold Technics Defendants do not object to the dissolution of the Joint Venture, but

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25 Although the California Corporation Code may prevent the legal transfer of the Rex Montis stock to Gold Technics, we see no impediment to the relief ordered by the district court that Rex Montis hold its stock in trust for Gold Technics.

argue that the district court improperly gave "all right, title and interest to equipment, and other [Joint venture] assets to Weston, the person responsible for the bad acts and collapse" of the Joint Venture. (Gold Technics Br. at 17.)

It is unclear whether the district court, in awarding $5,000, took into account the Gold Technics Defendants' interest in the mine lease and other mine assets. Accounting Findings 27. Although it is possible that the district court did take all of these matters into account when it ordered no further accounting between the parties, we can not be sure that it did so. Accounting Finding 33.

Therefore, we vacate the district court's award of $5,000 in "nominal damages" and remand for a complete winding up of the Joint venture. As part of the winding up on remand, the district court should allocate the venture's assets (which may include the mine lease or its proceeds) and the venture's liabilities in accordance with the Joint Venture Agreement and general partnership law. To the extent that the venturers are indebted to one another consistent with this opinion, those debts should be accounted for as part of the winding up.

D. Interest of R.E. Donahey (Gold Technics Defendants' Issue No. 4)

The Gold Technics Defendants contend that in dissolving the Gold Technics limited partnership and in allocating the money judgment among the Gold Technics Defendants, the court erred in failing to give any recovery to one of Gold Technics' limited partners, R.E. Donahey.

The district court made no express findings as to why it denied recovery to Donahey. See Jan. 22, 1986 Order Amending Judgment. The record shows that (1) Donahey was a full-share limited partner of Gold Technics (Exh. 305, Partnership Agreement): (2) Donahey signed the September 1980 Purchase Agreement with Rex Montis (Exh. 308); (3) Donahey signed a June 14, 1982 letter requesting rescis-

to recover on the same terms as the other limited partners of Gold Technics, or else should make findings explaining why Donahey is not so entitled.

IV. CONCLUSION

1. The district court's finding that the Associate Defendants were not obligated to pay cash assessments under the Joint Operating Agreement is AFFIRMED. The district court's judgment against Cascade and Weston and in favor of certain of the Associate Defendants for $70,448.68 in assessments wrongfully collected from them is AFFIRMED.

2. The district court's finding that Cascade and Weston breached their fiduciary duties owed to the Associate Defendants is AFFIRMED.

3. The district court's finding that Cascade and Weston misappropriated $629,474.63 From the Joint venture is VACATED and REMANDED with instructions that the district court reduce the amount by $165,000 to $464,474.63. Rex Montis is directly liable for misappropriating $10,500 of that amount. Interphase is directly liable for misappropriating $111,990.29 ($30,681.89 plus $81,308.40) of that amount. Cascade and Weston are liable for misappropriating the full amount, $454,474.63.

4. The district court's finding that Rex Montis, Interphase, Telegraph Limited, and Gnolaum Unitrust are alter egos of Weston and Cascade is REVERSED.

5. The district court's ruling that the associate defendants should be relieved from all liability for unpaid royalty payments and for any unpaid payments on the promissory notes is AFFIRMED.

6. The district court's ruling that the Associate Defendants should be relieved from all liability for their share of the $800,000 development loan is AFFIRMED.

7. The district court's judgment against Cascade and

Weston for $255,000 in attorneys' fees is AFFIRMED.

8. The district court's ruling that the Associate Defendants and the Gold Technics Defendants did not breach any fiduciary duties owed to Gnolaum Unitrust or the other Weston entities and did not engage in other tortious conduct against Gnolaum Unitrust or the other Weston entities is AFFIRMED.

9. The district court's ruling that the 35 working interests in the mine lease were not securities under federal and California securities laws is REVERSED and REMANDED for further proceedings. The district Court should resolve the Associate Defendants' securities claims on remand.

10. The district court's ruling that Weston and his entities were not liable for common law fraud or negligent misrepresentation in the initial offering of the 35 working interests is AFFIRMED.

11. The district court's ruling that the Associate Defendants are not entitled to recover for adverse tax consequences stemming from the misconduct of Weston and his entities is VACATED and REMANDED for clarification.

12. The district court's ruling that the Gold Technics Defendants are not entitled to rescission of the September 1980 Purchase Agreement is AFFIRMED.

13. The district court's failure to award damages in its conclusions of law to Gold Technics as a result of the conversion by Cascade, Rex Montis, and Weston of 38,000 shares of Rex Montis stock is REMANDED for clarification.

14. The district court's award of $5,000 in nominal damages to Gold Technics for the termination of the Joint venture is VACATED and the case is REMANDED for a complete winding up of the affairs of the Joint Venture or for clarification.

15. The district court's ruling that R.E. Donahey is not

entitled to participate in the recovery of the other Gold Technics, Defendants is VACATED and REMANDED for clarification.

The parties make numerous arguments in their briefs that we have not specifically discussed in this opinion. We have tried to limit our discussion to the major contentions of the parties, lest this opinion become even longer than it is now. Nonetheless, in reaching our disposition, we have considered all of the parties' arguments, including those that we have not specifically discussed in this opinion and we decline to grant any other requested relief on appeal other than as indicated herein.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED. [22]

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22 We note that this is a complicated case and the underlying situation may have changed since trial. We do not foreclose the district court from filling in gaps and doing other things consistent with this opinion in order to achieve a just resolution of the case. We also want to compliment the district court for its careful analysis and review of the very complex facts underlying the many disputes between the parties.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING APPELLANT W. DAVID WESTON'S PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 86-1156, 86-1157, 86-1202

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff - Appellee,

v.

JEFFERY G. BANKS, et al,

Defendants - Appellants.

ORDER

Filed April 25, 1990

Before McKAY, BARRETT and EBEL, Circuit Judges.

The court deny's the petition of appellant W. David Weston for rehearing.

Entered for the Court

ROBERT L. HOECKER, Clerk

(3)

90-81

No. . . . .

Supreme Court, U.S.
FILED
JUN 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendarts

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPELLANT APPENDIX "A - 2" DISTRICT COURT AMENDED FINDINGS INTERLOCUTORY JUDGMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION IN CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff,

v.

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY-AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, TELEGRAPH MINE LIMITED, a partnership, REX MONTIS SILVER CO., TELEGRAPH MINE JOINT VENTURE, GOLD TECHNICS, LTD., a limited partnership, INTERPHASE CORP., JAMES F. PETERS, as TRUSTEE of the GNOLAUM UNITRUST,

Cross-Counterclaimants and
Cross-Defendants

Bradley H. Parker, Esq., of Parker, McKeown & McConkie, Salt Lake City, -Utah, for plaintiff, counterdefendant and cross-counter- claimant Cascade Energy and Metals Corp.

Dennis F. Olsen, Esq., of Olsen & Associates, Salt Lake City, Utah, and Richard A. Love, Esq., Santa Monica, California, for defendants, counterclaimants, cross-claimants and

cross-counter-defendants Samuel Harmatz, Bernard Hodowski, Harmatz and Hodow-ski, a California partnership, H. E. Moses, Chris Waugh, A. C. Nejedly.R. E. Donahey, Grace V. Duncan and Elliot Weinberg.

George M. Haley, Esq., of Haley & Stolebarger, Salt Lake City, Utah, and Thomas L. Watters, Esq., Santa Monica, California, for defendants, counterclaimants, cross-claimants and cross-counter defendants Jeffery G. Banks, Kenneth Caldwell, Coastal Computer Investments, a California partnership, Elmer J. Davis, David G. Henry, Roger A. Mann, Mann Caldwell Partnership, Robert A. Nickerson, Peter P. Samarin, Patricia Stoltenberg, Herbert W. Stoltenberg, Edwin Stoltenberg, Delford Ashley, George Slater, Patricia Slater, Robert Doub, Sam Hambarian, AlyceHambarian, and Lionel Ascher.

Richard N. Bigelow, Esq., Salt Lake City, Utah, for cross-counter- claimants and cross-defendants W. David Weston, Telegraph Mine Limited, a partnership, Rex Montis Silver Co., Telegraph Mine Joint Venture, Gold Technics, Ltd., a limited partnership, Interphase Corp., and James F. Peters, as Trustee of the Gnolaum Unitrust.

William H. Orton, Esq., amicus curiae on behalf of non-party investors in connection with consideration of amendments to findings of fact.

CHRISTENSEN , J.

This case was tried to the Court beginning October 9, 1984, and continued from day to day with brief recesses to and including October 31, 1984, when it was submitted for decision on the evidence, the oral arguments of counsel, written briefs and proposed findings of fact and conclusions

of law suggested by counsel for the respective parties, all of which were duly considered. On March 1, 1985, the Court filed its Findings of Fact and Conclusions of Law with an invitation to counsel to suggest changes, if any, for their better conformity to the record. Various changes were suggested which were considered on March 26, 1985, after notice, together with changes discussed by the Court sua sponte, argument of amicus curiae who had been granted leave to be heard in behalf of non-party investors who might be affected although not bound by the Court's determinations, the forms of judgment to be entered, and preparations for the accounting to be thereby ordered.

Now deeming itself to be fully advised, the Court makes and enters the following

AMENDED FINDINGS OF FACT

I. STATEMENT OF THE CASE

I-A. General

1. Plaintiff filed its action against the defendants on December 17, 1982, claiming damages in contract and tort in connection with its services as operating manager of property known as the Telegraph Mine under contract with the owners of working leasehold interests in the mine, defendants herein(Defendant Associates). Certain other owners of workingleasehold interests in the mine are not parties, having nodifferences, or having resolved any difference with the plaintiff at least for the present.

I-B. Parties and Jurisdiction

2. The plaintiff was and is a corporation organized and existing under the laws of the State of Nevada and maintain-

ing its principal place of business in the State of Utah. The Defendant Associates were and are citizens of states other than the states of Utah and Nevada, principally from the State of California, and there existed at the commencement of the action and during all material times complete diversity of citizenship between the plaintiff on the one hand and the defendants on the other. The amount involved in each and all aspects of the actionis in excess of 510,000.00 exclusive of interest and costs. Subsequent to the filing of plaintiff's complaint, additional defendants were added with leave of court, all of whom were andare citizens of states other than Nevada and Utah, and compulsory counterclaims and cross-counterclaims between and among the defendants, the plaintiff, and other parties brought into the case in connection with said counterclaims and cross-counter- claims, were filed, over all of which the Court had and has ancillary jurisdiction as well as primary jurisdiction by reason of their being claims arising under the securities laws of the United States and claims pendent thereto.

3. The Court acquired complete personal jurisdiction by due and legal service-of process or voluntary appearances. Venue in this court was and is proper under governing rules and law, and most convenient for resolution of all related disputes between and among the parties.

4. The plaintiff Cascade Energy and Metals Corporation (Cascade) is a publicly held corporation, of which W. David Weston (Weston) during all material times was president, a member of its board of directors, the beneficial owner of a controlling stock interest in the corporation and acting within the scope of his authority from the corporation.

5. Rex Montis Silver Company (Rex Montis is a publicly held corporation formed under the laws of the State of Utah, of which Weston during all material times beneficially owned or controlled at least thirty-three percent of the

outstanding stock and was the president and a member of the board of directors and for which he was acting within the scope of his authority Rex Montis was formed in 1969 as part of a reorganization of a California corporation known as Rex Montis Company, of which defendants and counterclaimants Harmatz, Hodowski, Waugh,Donahey and Stoltenberg were shareholders.

6. Telegraph Mine Limited during all material times was and is a partnership controlled by Weston, with Cascade as its general partner.

7. Interphase Corporation (Interphase) was and is a Utah corporation and during all times material herein wasprincipally owned and solely controlled by Weston and performed, among other things, accounting services for Cascade and other entities with which Weston was connected. The Gnolaum Unitrust (Gnolaum Trust) during all times material herein was and is a revocable trust established by Weston for the benefit of his family, of which James F. Peters was the trustee.

8. Gold Technics, Ltd. (Gold Technics) was originally a California corporation known as Gold Technics, Inc. Thereafter, it was reorganized as a California limited partnership with Bernard Hodowski, Samuel Harmatz and Weston as general partners and a number of the cross-claimants and cross-counterdefendants as limited partners (Gold Technics Defendants).

I-C. Issues

9. Plaintiff's first amended complaint contains seven claims for relief: (1) breach of contract;.(2) quantum meruit; (3) breach of quasi contract; (4) breach of fiduciary duty; 15) tortious interference with prospective economic gain; (6) tortious interference with business; and (7) tortiousinterference with contracts. Claims 1, 2 and 3 arose out

of the contractual obligation plaintiff claimed defendants assumed by the Joint Operating Agreement for assessable costs and expenses beyond development and royalty notes signed by the investors. Claim 4 was for alleged breach of fiduciary duties againstHarmatz, Hodowski, Waugh, Donahey, Moses, Nejedley, Duncan and Weinberg for allegedly seeking to financially undermine the project for their personal gain. Claim 5 was against defendants Harmatz, Hodowski, H. Stoltenberg, Waugh, Donahey, Moses, Ascher Nejedley, Duncan and Weinberg for alleged tortious interference with plaintiff's prospective economic gain by reason of its ownership of a sublease working interest and contractual interest in all production at the Telegraph Mine. Claim 6 was against Harmatz, Hodowski, Waugh and H. Stoltenberg for alleged tortious interference with the business relationships of plaintiff as an owner of a sublease working interest and as operating manager of the Telegraph Mine by virtue of an alleged conspiracy totortiously interfere with the business relationships between the plaintiff and others. Claim 7 was against Harmatz, Hodowski, H. Stoltenberg and Waugh for alleged tortious interference with plaintiff's contract as operating manager for the Associates in the Telegraph Mine Associates' Project.

10. The investor defendants denied the materialallegations of plaintiff's first amended complaint, alleged that plaintiff made material misrepresentations and omissions of fact upon which defendants relied when entering into the contractual relation- ships with plaintiff and that the agreements were subject to rescission as procured by fraud and for other reasons and that they had been rescinded. Defendants allege that the interests were sold to them in breach of federal securities laws and California state securities laws; that any communications they. had with other investors were privileged, true and without malice and that any interference with contractual relationships was

justified. Defendants further alleged that the agreements were contracts of adhesion and contained unconscionable terms,including minimum annual royalty payment requirements of$2,600,000.00 annually.

11. Defendant Associates "first amended cross claim and third-party complaint" was against the plaintiff and W. David Weston, Telegraph Mine Limited, Rex Montis Silver Company, Gold Technics, Ltd., Telegraph Mine Joint Venture, InterphaseCorporation, James F: Peters as Trustee of Gnolaum Unitrust and 1000 Does, claiming rescission, restitution and damages based on alleged misrepresentation, fraud, breach of contract, violation of the federal and California securities acts, breach offiduciary duty, fraud and conversion, and for declaratory,equitable and injunctive relief.

12. The plaintiff and others as counterdefendants filed an answer generally denying the allegations of the counterclaim, raising as defenses accord and satisfaction, assumption of risk, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, res judicata, stature. of limitations, in pari delicto and waiver, and alleging that counterclaimants were sophisticated investors who assumed the risk of the investments and represented to the Internal Revenue Service that they were sole proprietors in the Telegraph Mining Associates Project. The plaintiff and other counterdefendants alleged by way of counterclaim against the defendants Harmatz, Hodowski, Waugh, H. Stoltenberg, E. Stoltenberg, Moses, Banks, Donahey, Nejedley, Duncan and Weinberg that they were co-promoters of the sales of sublease working interests in the Telegraph Mine Project and were jointly liable for any damage allegedly caused by plaintiff and 'third-party defendants' and that said defendants were estopped because of this relationship.

13. The Gold Technics Defendants, by way of answer

to the counterclaims against them and by adopting various responses of the other defendants, claimed truthfulness, accuracy and privilege for any alleged defamatory statements or other claimed tortious conduct, alleged that plaintiff was barred from any recovery due to the plaintiff's breach of fiduciary duty and fraud with regard to the Gold Technics Defendants and further asserted that plaintiff wasTechnics Defendants and further asserted that Plaintif f was barred from relief under the doctrines of unclean hands, laches, failure of consideration and failure to join indispensable parties.

14. The Gold Technics Defendants filed a separate counter- claim against plaintiff, Rex Montis, the Telegraph Mine Limited,, Gold Technics, Ltd., the Telegraph Mine Joint Venture, W. David Weston and Interphase as counter-defendants forrestitution and damages following alleged rescission of aSeptember 1, 1980, agreement concerning the exchange of 480,000 shares of Rex Montis stock for a thirty-percent ownership in the Telegraph Mine, breach of fiduciary duty by Rex Montis as a general partner of Gold Technics, Ltd., for failure and refusal to rescind the September l, 1980, agreement, and for declaratory relief concerning the rights, duties, liabilities and responsibilities of Rex Montis and Gold Technics, Ltd., under the September 1, 1980, agreement, for an accounting of Gold Technics, Ltd. and Rex Montis as general partner of Gold Technics, Ltd., for an accounting by the Telegraph Joint Venture and Cascade and Rex Montis as the Telegraph Joint Venture manager and Telegraph Joint Venture, respectively, for revenues, profits and assets of the Telegraph Joint Venture, for alleged breach of fiduciary duty in the conversion of assets, overcharging for services and equipment and obtaining secret profits, for damages, for fraud, misrepresentation and concealment in connection with the September 1, 1980, agreement and for the offering of the sale of sublease interests in

and operation of the Telegraph Mine, and for damages for interference with prospective economic advantages. Plaintiff and other counterdefendants filed an answer denying substantially the operative allegations made against them and raising the affirmative defenses of the statute of limitations, failure to pursue administrative remedies,laches, performance, failure to mitigate damages, release of liability, negligence and intervention by others.

15. As if this were not enough, Interphase and Gnolaum Trust filed a counterclaim against the Defendant Associates and Gold Technics Defendants, alleging breach of a Joint Operating Agreement and refusal to pay assessments thereunder, breach of partnership duty in connection with the Joint Operating Agreement, breach of fiduciary duty against Hodowski, Waugh and H. Stoltenberg, fraud against Hodowski, Waugh and H. Stoltenberg arising out of the 'Management Committee,' tortious interference with prospective gain against Hodowski, Waugh and H. Stoltenberg and tortious interference with contracts against Hodowski, Waugh and H. Stoltenberg.

16. Counterdefendant Telegraph Mine Joint Venture, filed an amended counterclaim against the investor defendants and Gold Technics Defendants for alleged breach of sublease agreement for failure to pay minimum annual royalties and assessments, breach of Joint Operating Agreement for failure to repay a loan, breach of subcontract for refusal to pay various amounts, to declare defaults under sublease agreement, breach of fiduciary duty as to Gold Technics Defendants, tortious interference with prospective economic benefits against Harmatz, Hodowski, Waugh, Moses and H, Stoltenberg, tortious interference with business relationships as to Hodowski, Harmatz, Waugh and H. Stoltenberg, and tortious interference with contracts as to Hodowski, Harmatz, H. Stoltenberg, Waugh and Moses.

17. An amended counterclaim of Rex Montis against

the Defendant Associates and the Gold Technics Defendants was for alleged breach of the Telegraph Mine Lease Purchase and Joint Venture Agreement against the Gold Technics' Defendants, breach of the Gold Technics/Rex Montis purchase agreement against the GoldTechnics Defendants, breach of the Telegraph Mine and Joint Venture Management Agreement against Gold Technics Defendants, breach of sublease agreement against Gold Technics Defendants, breach of fiduciary duties against Gold Technics Defendants, tortious interference with prospective economic benefits against Harmatz, Hodowski, Waugh, Moses and H. Stoltenberg, tortious interference with business relationships against Harmatz, Hodowski, Waugh and H. Stoltenberg and tortious interference with contracts against Hodowski, Harmatz, H. Stoltenberg, Waugh and Moses.

18. The counterdefendant Telegraph Mine Limited, filed an amended counterclaim against the investor defendants and Gold Technics Defendants for breach of the Telegraph Mine LeasePurchase and Joint Venture Agreement against Gold TechnicsDefendants, breach of the Telegraph Mine Venture Management Agreement against Gold Technics Defendants, breach of sublease agreement against Gold Technics Defendants, breach of fiduciary duties, tortious interference with prospective economic benefits against Hodowski, Harmatz, Waugh, Moses and H. Stoltenberg, tortious interference with business relationships againstHodowski, Harmatz, Waugh and H. Stoltenberg, tortiousinterference with contracts against Harmatz, Hodowski, H.Stoltenberg, Waugh and Moses, and for declaratory relief regarding Gold Technics' purchase of its interest in the Telegraph Mine prime lease.

19. An additional counterclaim was filed by Rex Montis, Telegraph Mine Limited, Telegraph Mine Joint Venture, Weston, Interphase and Cascade for declaration of rights

regardingcontracts with Gold Technics Defendants, breach of fiduciary-duties by Gold Technics Defendants, quantum meruit recovery against Gold Technics Defendants, fraud against Gold Technics Defendants, breach of agency against Gold Technics Defendants, tortious interference with contracts against Gold Technics Defendants and for contribution against Gold Technics Defendants.

20. Defendant Associates and the Gold Technics Defendants have filed answers to the additional counterclaims generally denying the allegations thereof and raising the affirmative defenses of the statutes of limitation, lack of subject matter and in personam jurisdiction, truth, privilege and absence of malice, justification, estoppel and laches, failure of consideration, the absence of necessary parties and the failure properly to align the parties and that the counterclaims were filed without leave of court and should be stricken. Indeed, all of the claims made by the various parties have been broadly denied and countered by all others involved and such adversity maintained so that aside from limited background facts largely of a neutral nature, everyone contests everything as it were. All of the charges and countercharges are intertwined and convoluted, rendering it difficult as a practical matter to consider part of them without considering all. And all claims and defenses arise out of a common nucleus of facts, although separate, distinct or ancillary in varying degrees and in various respects. It seemed imperative, in any event, that they should be resolved as far as possible in a single action, without further fragmentation or complication among multiple courts and jurisdictions in which they were being pursued when an effort was made to consolidate the claims here. It is understood that numerous actions are pending in various states involving the same subject matters and, dependent upon the outcome here, numerous others are contemplated.

21. An attempt was made to mercifully merge these pleadings into a pretrial order which, after considerable discussion among counsel and urgings toward simplification by the Court, was finally agreed upon by the parties and entered on September 17, 1984. The recitation of uncontested facts in this pretrial order is incorporated herein by reference, although to add context to these findings some of them are reiterated expressly. The hope for simplification of the issues, however, proved a forlorn one, since each of the parties held tight to almost every claim or defense referred to in the pleadings.

II. BACKGROUND AND SUBSIDIARY FINDINGS

II-A. Genesis of Offering - The Telegraph Mine

22. Several years prior to the time of the hereinafter discussed developments critical to this case, Harmatz, Hodowski and Waugh had been associated with Weston in connection with the affairs of Rex Montis. They became mutually interested in possible development of the Telegraph Mine hereinafter more particularly described. The change in organization of Gold Technics from a corporation to a partnership was with a view toward spreading income which Weston, Hodowski, Harmatz and Waugh hoped Gold Technics would realize as a result of their further association in the development of that mine.

23. The Telegraph Mine consisted of numerous mining claims located in San Bernardino County, near Baker, California, which had been mined periodically from 1932 to 1946 with some success in the production of gold. In 1974, Cascade hadacquired the Telegraph Mine for a consideration of $100,000.00, together with the assumption of a government loan outstanding against the property. Then the mine was in disuse and run down among other things be-

cause of the low price of gold, which was controlled by law at $35.00 per ounce. In May 1976 Cascade leased by prime lease the mining rights to Telegraph Mine Limited. The original mine claims were those particularly described as 'The Original Claims' in Exhibit 'E' to the 'First Amended Cross Claim' and Third-Party Complaint'1 on file herein. Other claims listed in Exhibit E' were added to the project throughthe efforts of Cascade after the purchase of undividedinterests by the Associates as hereinafter related.

24. After acquisition of its leasehold interest in the Telegraph Mine, Telegraph Mine Limited contracted to sell a forty-percent interest in its lease to Gold Technics, Inc., predecessor to Gold Technics, Ltd. In January 1979Gold Technics, Inc. and Telegraph Mine Limited entered into 'The Telegraph Mine Lease Purchase Joint Venture Agreement,' whereby for an agreed consideration of $150,000.00 Gold Technics,Inc. acquired a forty-percent interest in the lease and became part of the Telegraph Mine Joint Venture. On that same date, Telegraph Mine Limited, Gold Technics, Inc., and Cascade entered into 'The Telegraph Mine Venture Management Agreement,' whereby Cascade was made operating manager of the joint venture.

25. Subsequently, Harmatz and Hodowski approached Lawrence Williams with the problem of financing development of the mine. Mr. Williams was a California attorney with an extensive background in securities law and with particular experience in preparing offerings for the sale of interests in gold and silver mines. Weston was introduced to Williams by Harmatz and Hodowski. In January 1980 an agreement was reached between Cascade and Williams whereby Williams would prepare an offering Memorandum with supporting documents and file thenecessary documents for limited offering exemptions and permits or registrations with the states in which the offerings were to be made, with a view of selling thirty-five working

interests through subleases in the Telegraph Mine.

26. In May of 1980, when Gold Technics, Inc. was dissolved and the Gold Technics, Ltd. partnership was formed as aforesaid, an 'Agreement Covering Interests in Telegraph Mine' was entered into by Cascade, Telegraph Mine Limited, Gold Technics, Inc., and Gold Technics, Ltd., whereby the rights and obligations of the parties created under the January 1979 agreement were essentially preserved and Gold Technics, Ltd. acquired the rights and liabilities which had previously belonged to Gold Technics, Inc.

27. After being advised of probable adverse taximplications to Gold Technics, Ltd. of its forty-percent interest in the lease of the mine if and when the thirty-five working interests were sold, Gold Technics, Ltd. entered into anagreement with Rex Montis in September 1980, providing that Rex Montis would acquire a thirty-percent interest in the Telegraph Joint Venture (or seventy-five percent of Gold Technics' interest in the prime lease) and become the general partner of Gold Technics, Ltd. Rex Montis as consideration agreed to issue 480,000 shares (restricted) of Rex Montis stock to Gold Technics. The entire agreement was contingent upon the closing of the Telegraph Mine offering. Accordingly, it was contemplated that after the thirty-five working interest and sublease units were sold, the sublessors' interests would be, respectively, Telegraph Mine Limited sixty percent, Rex Montis thirty percent and GoldTechnics ten percent.

II-B. The Offering: The Confidential Memorandum

28. The offering of the sublease and working interests in the mine was accomplished through the use of a "Confidential Memorandum," consisting of various financial projections,geological reports and mining studies, docu-

ments setting out the terms of the offering, the risk factors involved and the tax aspects of the offering, a Joint Operating Agreement, and several other "Execution Documents." Williams had the majorresponsibility for drafting some of these documents, particularly as they related to the broad outlines of the project and its tax aspects, and he collaborated with and made suggestions to Weston on most of the other phases of the documentation, but Weston assumed the leading correlating role and the primary responsibility for the geological interpretations and financial projections, based on the geological reports upon which he relied and to which he referenced. The work of Williams and Weston in its various stages was sent to Harmatz and Hodowski from time to time for their suggestion and approval. With respect to the Joint Operating Agreement, Weston supplied essentially the final draft to Mr. Williams, who then incorporated it into the format of the offering. Indeed, the evidence at the trial disclosed that in 1982, at a time when Weston was trying to persuade the Associates that his interpretation of the contract as to the assessability of their interests was correct and that Williams' reported view to the contrary was not correct, Weston asserted that he, not Williams, knew what the contract provided because he was responsible for its language. Be that as it may, it is clear that Williams' efforts to safeguard the investors' potential tax advantages by providing for their broad individual control and essentially their right to manage the property especially during production phases, permeated its language and contributed to its effect, as finally formulated by Weston who was not an attorney, of essentially placing control in the hands of the investors, as hereinafter more particularly found.

29. The Confidential Memorandum, dated October 1, 1980, which was received in evidence as Joint Exhibit 1, consisted more specifically of a general statement of the

offering, an explanation of the terms, a description of the mining property, the contemplated activities and use of funds, the description of Cascade as operating manager and its compensation, a description of the Joint Venture offering the units and the managing agents of its members, the owners of the prime lease which would become sublessors of the mine to the investors as sublessees, the conflicts of interest among the offering parties and others connected with them, the risk factors to be considered in connection with any investment, a detailed discussion of tax aspects of the investment, explanation of the Joint Operating Agreement among Cascade and the investors and their rights thereunder, reference to the legal opinion of attorney Williams, tables of "Taxable Income and Cash Flow Projections," and instructions for responding to a pre-offering questionnaire. Attached were copies of "Execution Documents referred to in the preceding explanations": Exhibit A, Offeree Questionnaire; Exhibit B, Questionnaire for Offeree Representatives; Exhibit C, Working Interest Agreement and Sublease; Exhibit D, Joint Operating Agreement; Exhibit E, (Recourse) Royalty Note; Exhibit F, Security Agreement; Exhibit G, Geologist Owens' Report and Mine Costs Study attaching the older report of Geologist Tomo Ito which it evaluated and updated, and Exhibit H, Counsel,s Opinion Letter signed by Williams.

30. The summary of the project contained in the Confidential Memorandum referred to the exhibits above enumerated and "documents referred to herein," noting that those not included were available for inspection upon request in the offices of the operating manager. It was explained that each purchaser of units of working interests would enter into the Working Interest Agreement and Sublease effective at the date of purchase and ending when 'all merchantable ore' was mined from the Telegraph Mine. It was the stated expectation, subject to enumerated risk fac-

tors, that significant tax deductions would be experienced in the first year of an individual's acquisition and in taxable income in subsequent years.

31. It was further summarized in the Confidential Memorandum that thirty-five Units of Working Interests were being offered to selected investors with the requisite knowledge and experience to make an informed decision and who could bear the risks involved in the investment. Pursuant to their subleases, each purchaser would pay the sublessors during the term of the sublease royalties of twenty-six percent of gross sales proceeds from minerals extracted from the property but not less than the non-refundable annual minimum royalty of $74,285.00 per annum per unit. The sublease required that the 1980 annual minimum royalty aggregating $74,285.00 be paid $30,000.00 in cash and with a recourse note for $44,285.00, the 1981 annual minimum royalty to be paid in the same manner except for reduction in a "small amount" if the projected production in 1981 should be attained. It was further indicated by way of summary that each purchaser would also be liable for his pro rata portion per unit of a loan of $800,000.00 made by the sublessors on behalf of the program for 'development expenses' of the mine, the loan being due and payable on December 31, 1991, or at the termination of the lease, whichever was sooner. All notes were to carry interest at twelve percent per annum.

32. The purchasers were to receive a Working Interest and Sublease Agreement from Cascade in its capacity as the Joint Venture Operating Managing Agent for the Joint Venture Partners/ sublessors, who were The Telegraph Mine Limited and Rex Montis acting in its own behalf and as general partner of Gold Technics, Ltd. The operating manager, Cascade, was to receive a one-time initial fee of $800.00 per unit ($28,000.00) for legal, accounting and other services for the year ending December 31, 1980, and

additional compensation of two percent of the actual pre-production (development) expenses, as a development/construction management fee.

33. The terms of the offering as specifically set out later in the Confidential Memorandum and as explained in more detail hereafter, were generally in harmony with the summary. It was particularly stated that the Working Interest Agreement and Sublease required a royalty payment by all of the Associates of twenty-six percent of the gross sales price from the ore mined and sold in each calendar year, or an annual minimum royalty of $2,600,000.00 per year, whichever was greater, following 1980 and 1981 for which special provision was made. It was further stated that beginning with the execution of the Working Interest Agreement and until the time when the recourse notes were paid in full, they were to be paid at the rate of $13.44 per ton of ore mined and milled, and in any event no later than the earlier of December 31, 1991, or the termination of the lease. It was stated that the Operating Manager intended to use the 'shrinkage stoping' method of mining; that it was the intention of the sublessors to build a mill on or near the site of the mine and in the event the mill should not be constructed or proved inefficient, to use established mills in adjacent areas.

II-C. Contractual Control of the Venture by Investors

34. With specific reference to control of the mining operations, the Confidential Memorandum contained various statements. The summary sheet referred to the right of each purchaser of the Units of Working Interests toinstruct the operating manager as to the marketing, disposition or storage of the minerals. In discussing risk factors of the venture, the Confidential Memorandum emphasized investor control:

> In order for the Purchasers of the working interests to avail themselves of. the election under IRC, S 761 it is essential that the Purchasers of the working interests and the Operating Managers and/or other persons, will, as a group, be classified as a partnership and not as an association taxable as a corporation....If the Program should be treated as a corporation rather than a partnership, the election under IRC, S 761 would not be available, the Program would be required to pay federal income tax on its income, and the deduction and credits resulting from the Program would not be available to the Purchasers of the working interests. Also, the Purchasers would be taxed on any distributions substantially in the manner that corporations and their shareholders are taxed. Accordingly, most of the tax shelter benefits would be lost to the Purchasers....

Under Risk Factors it was stated:

> Units in the program are being offered to prospective Purchasers (Sublessees) pursuant to Rule 146 (the 'safe harbor' for private offering exemptions from registration) promulgated under the Securities [sic] of 1933, as amended .. [and that] [i]f a number of Sublessees were to successfully seek rescission, the Sublessees and the Operating Manager would face severe financial demands which could adversely affect their commitment to the Program, and, thus, the non-rescinding sublessors.

35. In the discussion of tax implications the Confidential Memorandum stated:

Centralized Management
Reg. Sec.301.7701-2(c)(3) provides:

> "Centralized management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by members of such organization. Thus, there is not centralized management when the centralized authority is merely to perform ministerial acts as an agent at the direction of a principal."

Under the terms of the Joint Operating Agreement, the Operating Manager will carry out the ministerial duties required in connection with the operation of the working interests, including maintenance of books and records and preparation of and filing of reports and tax returns. The Operating Manager will not be entitled to make any major decisions concerning the working interests, to borrow money or execute notes binding the Purchasers, to contract for the sale of minerals of a Purchaser without the request of the Purchaser, or make any management decisions or any expenditures outside the ordinary course of business until after consultation with the Purchasers. All major decisions must be approved by ratification of Purchasers owning more than one-half of the Working Interests. Since the Operating Manager's duties are primarily ministerial in nature, and they cannot make any independent business decisions on behalf of the purchasers without their ratification, it would appear that the Program does not have the corporate characteristics of "centralization of management."

Without reference to the tax problem, but in generally describing the Joint Operating Agreement, in harmony with its terms, the Confidential Memorandum summarized the "authority of operating manager" as follows:

> The Operating Manager has limited authority to conduct the day-to-day operations in connection with the mining of the property on behalf of the Purchasers. These acts include overseeing the maintenance and day-to-day operations, the execution on behalf of the program of mining contracts in accordance with the financial projections, overseeing the operations and performance of the Sublessors and contract miners, requiring contract miners to carry sufficient workmen's compensation insurance and public liability insurance and providing the necessary reports and filing to comply with laws applicable to leasing and operation of mineral properties, collect and receive the proceeds from the disposition of the minerals, paying all royalties, costs, taxes and expenses of the operation, causing the proceeds of the Development Loan to be used for the development costs only and providing for the repayment of such Loan and maintaining funds received in connection with the Working Interests not distributed to the Purchasers in a segregated account.

Then, indicating that there could be even greater control by the investors during production, it was stated that the operating manager "will perform the work described in the Agreement to develop the mine to the point that it may be placed into production." The operating agreement itself expressly provided among other things:

operating manager "will perform the work described in theAgreement to develop the mine to the point that it may beplaced into production." The operating agreement itself expressly provided mong other things:

> 15. Actions by the Purchasers. Purchasers owning a majority of Units shall have the power (i) to direct the Operating Manager as to the conduct of the business oftheir working interests (ii) to adjust and pass on the Operating Manager's Accounting, and (iii) to authorize and direct the Operating Manager in management decisions. Anything herein to the contrary notwithstanding, no Purchaser shall have any right to encumber or dispose of any other Purchaser's interest in the property of pro rata share of the ore mined, milled and removed from the Property.

II-D. Personal Liability of Associates for Assessments

36. The Confidential Memorandum in harmony with the copies of basic agreements annexed thereto stated with respect to the "Liabilities of Purchasers":

> Purchasers will be generally liable for their ratable portions of certain losses of the Program in excess of their investment, including liabilities and damages arising out of operating hazards which are uninsured or exceed policy limits because of the joint and several liability imposed by law upon owners of undivided interests in mineral properties (see 'Risk Factors'). The Operating Manager eitherdirectly or through the subcontractors will obtain liability insurance covering each of the Purchasers as well as to meet any requirements under the Lease to the Sublessor. In addition, a Pur-

> chaser will have certain liabilities pursuant to the Royalty Note and the Development Loan....

The first-mentioned liabilities obviously relate not to general operating expenses nor to contracted payments but to uninsured risks assumed by operation of law, in counter-distinction to the Development and Royalty note obligations on which the Associates were liable. Possibility of the insufficiency of the $800,000.00 development fund is tied not to any personal liability but to payment out of production :

> While the Operating Manager believes that $800,000 is the maximum which will be required to expend for the initial development work to get the property into production, there can be no assurance that additional funds will not be required. In such event, it is expected that the funds would be available from production as the development work proceeds.

In negation of any inference that such excess costs might involve personal liability on the part of the purchasers, the Confidential Memorandum repeatedly refers thereafter to personal liability as being limited to the notes, except to the extent that payments would be made out of production assignable to them. On page 23 of the Confidential Memorandum it was stated:

> Although each Purchaser will have no personal liability under the terms of the Working Interest Agreement, except for the recourse Royalty Note, and the development Loan, each Purchaser should be aware of the fact that the working interests are not limited partnership interests in the property. As the owners of working interests, each Purchaser

> is subject to unlimited liability over and above his investment for matters which might occur as a result of the activities, including operations under the Joint Operating Agreement. In organizing TELEGRAPH MINING ASSOCIATES, an attempt has been made to limit the contractual personal liability of the Purchasers. Therefore, the Joint Operating Agreement provides that the Operating Manager, on behalf of the Purchasers, will or cause subcontractors to obtain workmen's compensation and public liability insurance to cover the Purchasers for insurable risks. No provisions have been made to cover uninsurable risks or risks arising out of statutes or regulations by governmental authorities or bodies.

In paragraph 10 of the Joint Operating Agreement, the provisions for "compensation in full for all services rendered" by the operating manager were reiterated, prefaced by a provision for "[r]eimbursement of its out-of-pocket costs of management incurred for the Program which shall include travel expenses and fair allocation or pro rata share of operating, handling, managing and overhead expenses, including expenses for group insurance, safety, hospitalization and retirement, but excluding expenses for any profit sharing payment." In paragraph 13 of that agreement under the heading, Liability of Purchasers, it is stated:

> (a) The liability of the Purchasers shall be severable, not joint or collective. Each Purchaser shall be responsible only for his obligation as herein set forth, and only for his proportionate share of expenses and obligations in connection with the Property.
>
> (b) All costs and liabilities incurred in the exploration and development of the Property and the mining, milling and removal of ore therefrom

shall be borne and paid for by the Purchasers in proportion to their interests.

(c) Notwithstanding anything to the contrary contained herein, the Operating Manager shall have no authority, express or implied, to enter into any commitment or obligation on behalf of the Purchasers or otherwise do anything which would subject the Purchasers or any of them, to any liability in excess of the Purchasers' respective interests in the minerals mined, milled and removed from the Property and their interest in any proceeds from the sale of said minerals.

37. There was no suggestion to the contrary among the "Risk Factors" spelled out in detail in the Confidential Memorandum.

II-E. Risk Factors Reviewed in Contract

38. The Confidential Memorandum expressly pointed out that the investment in the purchase of units -involves a high degree of risk and is suitable only for those persons who have a substantial net worth, no need for liquidity in connection with, and can bear the risk of such an investment including a total loss.' The general risks of such a venture were delineated, as were particular risks relating to mining reserves, the market price of gold and silver, contract mining, labor disruptions in the mining industry, government regulations, weather interruptions, operating hazards, transportation and milling, the unlimited personal liability of the purchasers for the development and royalty notes and on uninsurable risks of the operation, conflicts of interest with particular reference to the various other activities of Rex Montis and the operating manager, tax risks, the categorization as a partnership for income tax purposes, personal liability upon default of notes, risks pertaining to

exclusion from requirements of the Securities Acts, legal counsel, and the complex rules and issues involved in determining the availability to the purchasers of the tax deductions intended to be claimed by them. Among other things it was stated:

> market prices of gold and silver are subject to wide fluctuations....During the period since gold has been permitted to trade freely in the United States, the price of gold and silver per ounce has ranged from a low of approximately $102 and $3.80, respectively, to a high of approximately $875 and $19.25 per ounce, respectively.

The assumption included in the projections was the price of gold for 1981 of $525 per ounce. The actual low for 1980 had been $462 and the high $875. By September 1981 the price had dropped as low as $425; in 1982 it varied between $300 and $500; at the end of 1983 it had fallen to about $350, and at the present it is approximately $325, according to market data of which the Court takes judicial notice. Weston testified at the trial that the price of gold at the time the Confidential Memorandum was prepared was about $600 per ounce and that it dropped to $500 in 1981 and to $300 in 1982. Hodowski testified that he discussed the risks pointed out in the Confidential Memorandum with his advisors and they and he thought the risks were acceptable, considering that the price of gold was about $800 an ounce and there was a possibility of it going up to $2000.

II-F. The Sale of the Offering

39. Prefacing the offering in the Confidential Memorandum was this statement:

The offering for TELEGRAPH Mining AS-

> SOCIATES (The "Program") described in this Confidential Memorandum (the "Memorandum") consists of 35 Units of Working Interests (the "Units"), each requiring an Annual Minimum Royalty of $74,285 per year per Unit. The Working lnterests are for the right to extract gold, silver and other minerals from certain mining claims located in San Bernardino County, California, as more fully described herein. The offering is only available to certain qualified individuals (the "Purchaser") as more fully set forth under "Terms of Offering - Suitability Requirements for lnvestors", herein.

Among other things, it was stated under the heading "Terms of the Offering":

> Each offeree before receiving this Memorandum must complete an Offeree Questionnaire and, where applicable, an Offeree Representative Questionnaire. No offer will be made nor a subscription accepted from a Proposed Purchaser unless such person has the requisite knowledge and experience or unless such person has the benefit of the advice of a representative having such knowledge and experience and such Purchaser demonstrates that he is able to bear the economic risk of the investment.

40. The following is a list of the purchasers of sublease and working interest units or portions thereof in the Telegraph Mine along with their respective interests, as of December 31, 1980, when the offering became fully subscribed:

> Lionel Ascher, Long Beach, CA - 1/2 unit
> Delford R. Ashley, La Mirada, CA - 1 unit

Yukio Ayabe, Honolulu, HI - 1 unit
Jeffery G. Banks, Oakland, CA -1 unit
Phillip M. Bentz, Marina Del Rey, CA - 1 1/2 units
Ronald L. Benzer, Grover City, CA (Benzer Rof foni Partnership) - 1/2 unit
Joseph Bogan, Los Angeles, CA - 1 unit
Coastal Computers Investments, San Luis Obispo, CA composed of Ron Santore, Larry Soderberg and Dale Ouimette) - 1 unit
Elmer J. Davis, Downey, CA - 1 unit
Robert Doub, Whittier, CA - 1 unit
Harry E. Fisher, San Luis Obispo, CA - 1 unit
Jerre M. Freeman, Memphis, TN - 1 unit
Ken Glick, Shell Beach, CA - 1 unit
Joseph Green, Honolulu, HI (Green Higashi Partnership) 1/2 unit
Brent S. Halverson, Alamo, CA - 1/2 unit
Sam and Alyce Hambarian, Orange, CA - 1 unit
Marian Harada, Wahiawa, HI - 1 unit
Harmatz and Hodowski, Los Angeles, CA (composed of Samuel Harmatz and Bernard Hodowski) - 1 unit
David G. Henry, Seal Beach, CA - 1 unit
Charles Y. Higashi, Honolulu, HI (Green Higashi Partnership) - 1/2 unit
Gnolaum Unitrust, Salt Lake City, UT - 1 unit
C. K. Jorgensen, San Luis Obispo, CA - 1 unit
Level II Corp. - 1 unit
Harold H. Masunaga, Wahiawa, HI - 1 unit
C. B. McDonald, Pineilas Park, FL -1 unit
Richard McKean, Salt Lake City, UT - 1 unit
L. E. Muller, Germantown, TN - 1 unit
Robert A. Nickerson, Pacific Palasades, CA - 1 unit
William Y. Ohara, Waipahu, Hl - 1 unit
John Roffoni, Santa Maria, CA (Benzer Roffoni Partnership) - 1/2 unit
Peter P. Samarin, La Habra, CA - 1 unit
George and Patricia Slater, Walnut Creek, CA -1/2

unit
Lowell R. Smith, Salt Lake City, UT - 1 unit
Edwin and Patricia Stoltenberg, Evergreen, CO - 1/2 unit
Herbert W. Stoltenberg, Los Alamitos, CA - 1 1/2 units
Chris Waugh, Long Beach, CA - 1/2 unit
C. T. Whitney, Buellton, CA - 1 unit

Some of the above-listed Associates defaulted early on their obligations as sublessees and their interests were acquired by others. Other individuals, including Roger A. Mann, Kenneth Caldwell (Mann Caldwell Partnership) and H. E. Moses who are defendants and cross-claimants in this suit, subsequently purchased interests. Other Associates have disassociated themselves with the party defendants here, support the good faith and position of Weston, have not been named defendants by Weston and have declined to join the defendants in this suit.

41. Offers and sales of the sublease and working interest units in the Telegraph Mine were accomplished in various ways and by several persons. Weston and Ronald Benzer, an employee of Cascade, attended a conference of the National Committee for Monetary Reform held in New Orleans, Louisiana, in November 1980. They set up a booth in the exhibit section of the conference which displayed materials relating to the Rex Montis mine and Cascade. While Benzer testified at trial that interests in the Telegraph Mine were promoted directly from the booth over a period of two days to numerous people and that copies of the Confidential Memorandum and other Telegraph Mining Associates' offering documents were available at the booth, the more credible evidence indicates that individuals who visited the booth were screened as possible investors in the Telegraph Mine, and if they appeared to be interested in

such a program, they were invited to meet privately with Mr. Weston so it could be determined whether or not they met the suitability requirements and could receive the offering documents. Only two sales of Telegraph Mine sublease and working interests were made as a result of contacts made at this conference. Subsequent to the New Orleans conference, Weston and Benzer, both shareholders in Rex Montis, attended a Rex Montis shareholders' meeting in Honolulu, Hawaii, where Weston explained the Telegraph Mine Associates' offering to a substantial number of attendees at the meeting. Hodowski who was present at the meeting estimated the number at 100; Weston at 20. Also, while in Hawaii, Weston and Benzer met privately with one or more individuals regarding the offering. Six Hawaii residents purchased interests in the Telegraph Mining Associates' offering. On December 2, 1980, a meeting was held in Buena Park, California, which was attended by Herbert Stoltenberg, Robert Doub, David Henry, Chris Waugh, and H. E. Moses, who eventually bought interests in the Telegraph Mining Associates; and also by a number of other persons. As an indication of the difficulty of evaluating broad claims with respect to indiscriminate offerings, Waugh who was present testified that he didn't remember how many persons were actually present at this meeting but inferred that there were many, since the conference room was set up with chairs for forty or fifty persons, whereas Mr. Stoltenberg testified that about fifteen people were present, and it was stipulated at the trial that other Associates if called would have testified essentially in accordance with Stoltenberg's testimony. In addition, Weston went to Oakland, California, to present the offering to Jeffery Banks. Harmatz and Hodowski discussed the offering with several of their clients individually, including Ascher, Davis, Bogen, Henry, Doub, and the Hambarians, and recommended that they invest. Benzer sold interests in the

Telegraph Mining Associates to Rofoni, Fisher, Glick, and Coastal Computers. Brent Halverson advised Caldwell, Mann and the Slaters to invest in the project. Joseph Green referred to Weston five persons who eventually became Associates

II-G. Development of the Mine and Intervention of Investors' Management Committee

42. Not long after the offering became fully subscribed, Weston began to explore the possibility of conducting heap leaching and surface mining at the mine, methods which were not described in the Confidential Memorandum. Over the next several months, metallurgical tests were done to determine the feasibility of heap leaching the ore at the mine and surface mining equipment was acquired. A meeting of the Associates was held in Las Vegas on July 31 and August 1, 1981, at which Cascade presented a proposal to institute a heap leaching operation. The Associates were told that surface mining of certain ore would be quicker and less expensive than the stope and milling method described in the Confidential Memorandum and thus the "scalping" of early profits would be made possible. A vote was taken at the meeting for approval of the proposed heap leaching operation at the mine, and a majority of those present approved the heap leaching plan.

43. Attending the July 31 Associates' meeting in Las Vegas was Mr. Leon Hansen, a consulting geologist who had previously been retained by Mr. Halverson, a CPA who was an Associate and co-promoter of the offering, to visit the Telegraph Mine and report on his observations. On August 6, 1981, Mr. Hansen wrote a letter to Mr. Halverson summarizing his observations and impressions and making certain recommendations of preliminary "staging" activities that he thought should be reconsidered. He expressed the

opinion that the "housing, milling and other rather heavy up-front expenditures are premature and would be considered by many as "promotional in concept" at that time.

44. Subsequently, on August 21, 1981, Hansen and Halverson met with Weston at the Cascade offices in Salt Lake City, and on August 27, 1981, Hansen again wrote to Halverson, this time stating that after meeting with Weston, he felt that there "may be some urgency to consider restaging the program." Hansen indicated that apparently management did not have a "clear picture" of the property situation, i.e., there was some doubt about whether claims had been staked on certain property adjacent to the mine which appeared to be ore-bearing. He reiterated his recommendations of August 6, and also suggested some drastic "restaging" at the mine, including removal of equipment and buildings from the site, curtailing of all utilities at the mine and discontinuance of surface scraping and activity so that further geological and geochemical activities could be conducted "au natural."

45. Halverson wrote a "Memorandum of Concern" to the investors in the Telegraph Mining Associates on September 4, 1981. This memorandum informed the Associates that Weston and Hansen were strongly divergent in their views as to the order of priorities in committing and expending capital on the project. Halverson stated: "Their divergences of opinion with regard to labor, equipment, housing, "home office burden' shared expenses, mining procedural plans, are gross." He pointed out that the venture was highly structured for tax write off, and expressed his opinion that if the economics of the project failed, the tax strategy would also. The memorandum indicated that Halverson and Hansen had suggested to Weston that the Associates might want to defer tax benefits until some "hard core analysis and evaluation of the geologic economic potential of the claims" could be done. Weston rejected this

on grounds that he had to spend capital as outlined in and within the time frame of the Joint Operating Agreement and, in addition, further geological study would be too expensive and the time delay would destroy the tax deductions. Halverson suggested to the Associates a brief moratorium on any further development until a majority of interests could be represented in a meeting with management. It was proposed that local representatives be chosen by the Associates so that a majority in interest of four or five people could quickly be formed through the use of proxies or powers of attorney.

46. On or about September 15, 1981, Benzer, an Associate and the then Vice President of Cascade, telephoned one or more other Associates to express his concerns over alleged improprieties of Cascade and/or Weston with regard to management of the Telegraph Mine. Among other things he asserted:

(a) Certain appendices to the Tomo Ito report which showed very low assay values at the mine, were omitted from the Confidential Memorandum.

(b) Weston's estimates of ore at the mine were highly inflated.

(c) Weston had used a certificate of deposit belonging to the Associates to secure a personal loan to Weston for the benefit of Interphase.

(d) Weston had "padded" the prices, by $1,500 each, of five trailers sold to the Associates by Cascade.

(e) The Associates had been charged excessive amounts for items such as installation of security fence and an archeology study conducted by Benzer at the mine.

(f) Tomo Ito owned an interest in the Telegraph Mine when he wrote his report on the mine.

47. Benzer had obtained a sworn affidavit from Calvin L. Griffiths, an internal accountant for the Associates and Cascade, which tended to support Benzer's allegations of

some financial misconduct on the part of Weston and Cascade.

48. As a result of the various allegations made regarding mismanagement of the Telegraph Mine, a majority of the Associates executed powers of attorney to Herbert Stoltenberg and Chris Waugh to act as attorneys in fact for purposes of investigating the operations at the Telegraph Mine and for removing the operating manager and appointing a new manager if deemed necessary. Stoltenberg, Waugh and Hodowski traveled to Salt Lake City to meet with Weston regarding these matters and with the intention of firing Cascade as operating manager of the mine should the charges prove true.

49. After meeting with Weston for several hours on September 24, 1981, those holding the powers of attorney, denoted "Telegraph Mine Management Committee," became convinced that the mine was being managed properly and that Cascade should stay on as operating manager, subject to the Committee's further conference with Ron Benzer and contact with Tomo Ito. Weston's explanations of t.he major charges against him had been that:

(a) The appendices to the Tomo Ito report were left out of the Confidential Memorandum inadvertently. They had been turned over to Joseph Owens as part of the Ito report when he was compiling his own report on the mine, and had not been returned to Cascade with the rest of the report. This was not known at the time of printing of the Confidential Memorandum.

(b) The estimates of the amount and quality of ore at the mine were not highly inflated. Both Tomo Ito and Joseph Owens determined that there were 72,000 tons of proven ore at the Telegraph Mine and 540,000 tons of probable reserves at the mine. This was considered to be a conservative estimate of the actual ore at the mine. Also, as explained in the Tomo Ito report, although there were

some very low assays at the mine, these were not reliable measure of the average grade of ore at the mine because these particular samples were of the type of ore that shattered and turned to fine-grained material when drilled; thus, much of the gold content would be lost during drilling.

(c) Weston had improperly pledged a certificate of deposit belonging to the Associates as collateral on a loan to Interphase for which he apologized.

(d) The $1,500 added to the price of each of the five trailers sold to the Associates by Cascade was the result of a misunderstanding between Weston and Griffiths, the accountant. Weston stated that he told Griffiths to add $1,500 total to the price of the five trailers, for improvements made to the trailers by Cascade and for transportation to the mine site, and Griffiths thought he meant to add $1,500 to the price of each trailer.

(e) The charge to the Associates for the security fence was fair considering that it encompassed many items such as leveling the land, road improvement, etc., and considering that it was an eight-foot high, chain-link fence surrounding a thirty-acre mill site.

50. While at the Cascade offices, the committee also met privately with Griffiths, who by this time had executed a second, more detailed affidavit which tended to support Weston's explanations of the alleged financial misconduct. In any event, it was agreed upon by Weston and the committee that Weston would henceforth submit budget requests to the committee for approval and checks from the development loan account would be issued or countersigned by a committee member for the approved amounts. Benzer resigned his position with Cascade shortly after making the charges of mismanagement against Weston, and upon his departure took without authority from Weston's office carbon column plans in connection with the leaching operations and various personal papers of Weston, for which he was

sued by Weston in connection with a claim for defamation. The suit thereafter was settled and the missing papers returned to Weston with Benzer's apologies.

51. On October 29, 1981, Mr. Stoltenberg wrote to Harry E. Fischer, an Associate, with reference to the September 24, 1981, meeting, among other things stating:

> After Chris Waugh, Bernie Hodowski and I met with Ron Benzer prior to our trip to Salt Lake City, we were all fairly well convinced that there was a very serious question as to whether the grade of the ore at the Telegraph Mine was anywhere near that which was represented by Tomo Ito and Joe Owens in the Memorandum.
>
> We also felt that there was a good possibility that fraud was perpetrated in the selling of the investment units, mainly because the pages containing the assay results of the ore drillings were not included in the Memorandum.
>
> We also believed that Ron had raised some serious questions concerning the handling and spending of the Associates' funds (i.e., of the $800,000.00 loan proceeds).

Mr. Stoltenberg then described his further investigation and the Salt Lake meeting and the impressions obtained at that meeting:

> Having had our previous conceptions concerning the core drilling sample assays seriously eroded, we felt that the case for fraud had all but evaporated, and that we had insufficient expertise with which to weigh the relative merits of Tomo Ito's conclusions as compared to Ron's (or Leon Hansen's) conclusions.

As a result, we felt that it would be imprudent of us to bring the operation to a halt and possibly jeopardize the investments of all of the Associates, including those from which we had no powers of attorney. We attempted to contact both Ron Benzer and Leon Hansen while we were in Salt Lake, but without success. We subsequently met with Tomo Ito and I had a telephone discussion with Leon Hansen. As we discussed Tuesday evening, Tomo Ito stood by his report 100% He stated that he considered the assays of the core drilling samples to be very unreliable, due to the shattering of the ore. He repeated several times that he believed his report to be quite conservative, both in terms of grade and quantity of ore.

He said that he spent considerable time at the property, including time spent there while the core drilling was going on. He said that he did have an ownership interest in the Telegraph Mine.

Based upon my telephone conversations with Leon Hansen, and upon my observations of his statements and activity during the July meeting in Las Vegas and at the property, I have no reason to question Leon's sincerity. He has impressive credentials, and I found him to be a very convincing advocate of his theories and opinions. I must admit that he created a doubt in my mind as to the accuracy of Tomo Ito's conclusions.

Leon's conclusions, as I understand them, are that the property consists of a series of bifurcating (splitting) veins which pinch and swell, and not of a more or less continuous body of ore as Tomo Ito's report suggests. He further believes that most of the high-grade ore "within reasonable sight" (i.e.

shows on the surface) has already been mined; that there may well be other pockets of ore; but that detailed geology would be required to determine the existence of same.

It did seem to me, however, that the fact that Leon did not take any of his own ore samples, and did not spend very much time actually examining the property might be relevant in connection with the accuracy of his conclusions.

Bernie Hodowski said that on the other hand, he had been present at the property when Joe Owens examined the property and took ore samples, and that he observed Joe taking the samples, and label each sample in a separate bag. Bernie said he had personally carried the rather heavy sack of samples collected by Joe.

As stated above, we felt that it would be presumptuous of considering our lack of expertise on the subject, to make any judgments which would affect the considerable investments of many others.

We did feel that it might be helpful to obtain an opinion from another geologist. As we informed you, we told Dave of our concerns, and he immediately retained Dr. Nead [sic] LeRoy Jensen, who teaches at the University of Utah, to examine the property, take ore samples, and write a report. It is my understanding that Dr. Jensen's report should be finished at this writing, and that Dave will send copies of same to all of the Associates forthwith. I hope that the above is helpful in explaining our actions (or non-actions). I also hope that, in the final analysis, we will all have benefited by the

questions raised by Brent Halverson and Ron Benzer.

52. As a result of the September 24, 1981, meeting of the Telegraph Mining Associates, and by agreement of Stoltenberg, Hodowski and Waugh, Dr. Mead L. Jensen, a geologist and geophysicist, was retained by Weston and a "review" was made of the Telegraph Mine on October 7-8, 1981, "to examine the operations, study geological reports written about the property, and collect samples for assay to verify prior assay results." Based on those factors and that examination, Dr. Jensen made a report of his procedures and findings and submitted the following conclusions and recommendations:

1. The Telegraph area is a previous metal mineralized area of viable potential. Gold occurs in shear zones of minable thickness,'tonnage, and concentration to provide an economically successful venture.

2. Mining to a depth of 450' along the known 2000' strike of the Telegraph (Mine) vein provides a total tonnage of 300,000 T before subtracting 75% reduction for dilution and losses during leaching. (Slurry leaching tanks could rise the leaching operation to more than 90% recovery of -40 mesh crushed material).

3. The tenor of gold varies from nil to several ounces. The average according to my preliminary study and Mr. Ito's results is about 0.354 oz/T but, based on many more prior assays gives a value of about 0.5 oz/T.

4. Using the 0.354 oz/T assay, the gross value of ore is 34,785,000 or $154.60/T assuming $400/oz Au and $10/oz Ag. More than 90% of the

value is derived from gold.

5. My estimate of the cost of the operation is comparatively high, $60/T, because of underground selective mining. Nevertheless, a net profit from 300,000 t, diluted by 75% should be about $17,000,000. (Royalties, lease agreements, loans, interest, etc. are not included because such information is not known by me), As there is visible evidence of the Telegraph vein extending to the north, and evidence of persistence of the vein at depths in excess of 450', the net profit could double to $35,000,000.

6. The development of the property for mining, location of the trailer site and facilities, construction of metal building to house equipment and metal precipitation facilities, and the site of the pads meet not only with my approval but also with my praise.

7a. The prime need of the project is a detailed geological mapping of the area. The petrological and hydrothermal alteration features of the area are of primary consideration of the geological mapping.

b. Geophysical studies of this area are of minor needed significance. I.P. (induced polarization) studies would be useless because of the low content of sulfide and precious metals. Similar objections pertain to electromagnetic (vertical or horizontal and phase shift) techniques. Magnetic studies might aid in identifying varying intrusive rocks, especially alaskites versus granodiorites. But such information would not be too significant, and petrographic studies included in the geological study could provide better results.

c. Soil and rock samples for geochemical prospecting studies are being collected as an ongoing program. I would, however, not recommend any increase over the present program level.

Geochemical prospecting is no panacea for mineral exploration nor does it even seem terribly worthwhile in an area, such as the Telegraph District, where veins are fairly well exposed at the surface. Where the surface indications are not the best, bull-dozer cuts across the vein structure can provide better access for considerably more information than geochemical samples. The fact that Donald Foster Hewett, who I knew, and the author of Prof. Paper 275, located more than 20 veins in the Telegraph area, in the 1920's, by pure geological mapping, and rapid reconnaissance mapping, is indicative of the value of the geological mapping program.

53. Cascade endeavored to work closely with the Associates; committee following their appointment on September 24, 1981, although it proved difficult to coordinate views and activities because of limited communication, day by day problems impossible to solve by correspondence, Weston's desire to operate the mine essentially in accordance with his own ideas and the committee's desire to control expenses essentially in accordance with its own ideas. Each month Cascade submitted a budget request to the committee for the following month. Upon approval of the budget request, the committee issued checks to Cascade from the segregated development loan fund control account in the amount of the approved request. At the conclusion of each month Cascade submitted to the committee duplicate copies of checks, invoices, intercompany billings, equipment charges, and payroll invoices to support the amounts withdrawn. Production through the crusher commenced the latter part of February of 1982. Inclement winter weather hampered production, but in March the-re was an emplacement of 1,145.5 tons of pretreated ore upon the leach pad. In April 1982 an additional 2500 tons were

being sprinkled. The first shipment of concentrates was made April 19, and in its report to the Associates dated April 20, 1982, Cascade indicated that shipments would continue on a regular basis. Its report of April 20, 1982, stated:.

> Now that production has commenced and with the expenditure of all of the loan funds, our quarterly reporting will take on a new format to reflect the cost of production, continuing exploration and development, and the results thereof. A copy of this format is submitted to you for the first quarter of production in 1982. The cost production for the period shown is the amount which is now in excess of the development loan funds.
>
> The first quarter summary also reflects the necessity of selling such of the production, as it is produced, to meet these ongoing mining costs. To date, these continuing expenses have been met by personal advances made by Cascade and myself. These expenses are an Associate obligation. The quarterly summary, therefore, will reflect tons of ore mined during the quarter and the production expenses in dollars. Based upon the average price of metals for the quarter, all expenses will be reduced, in the summary form, to the value of the metals produced. Thus, the quarterly summary will display the net metals either available for delivery or available for sale for your account, based upon your election. For those who would otherwise desire to pay their production expenses in advance, in cash, the ounces of gold and silver shown under "total expenses", less the 5% management fee, would also be available for distribution. Please review the above carefully along with the enclosed quarterly summary and, if you have fur-

ther questions, please call and discuss them with either myself or members of our staff. Otherwise, you should make your election, in writing, to receive in kind, if you so desire, as soon as possible.

54. On August 14, 1982, at Las Vegas, Nevada, there was a meeting of the Associates designated "Second Annual Telegraph Association Meeting and Convention." At this meeting, Mr. Weston, among other things, stated that he was surprised that some Associates had not expected to receive "the second quarterly billing" for "assessable" expenses. He stated that the quarterly billings were necessary because Cascade had paid the start-up operating expenses at the mine in behalf of the Associates since March and the "Operator must restore its credit base." Griffiths, the Comptroller, reported that loans had been obtained by Cascade and David Weston to provide the working capital in behalf of the Associates for the "start-up operations" of the mine in the amount of $372,000.00. Small souvenir bars of gold from the first production of the mine were displayed to the Associates, thirty-five of these bars having been made and it being indicated that they would be distributed to "each Associate who had paid his second quarterly bi11ing." Mr. Hodowski stated that he,Bentz, Waugh, Dale Ashley and Sam Harmatz had come to Salt Lake as a committee to audit the books and records of the company and were happy to report that they found everything in order and above board. He also stated that it could be of more value to the management if a larger steering committee was designated to consist of from five to seven Associates. Mr. Bentz, Mr. Ashley, Mr. H. Stoltenberg, Mr. Waugh, Mr. Green, Mr. .Smith and Mr. Hodowski were nominated as a steering committee with Mr. Doub and Mr. Harmatz as alternates and it was agreed that the ballots should be sent to all Associates, Mr. Stoltenberg to act as Secretary of the steering committee.

55. On October 8, 1982, Mining Engineer Martin J. Hughes made a report upon his engagement by the Management Committee'to review the start-up; to check all methods and procedures and to recommend any appropriate actions which might result in improvement in results." Among other things he stated:

> Problems have been encountered by the Telegraph Project. They have not been excessive and they are of the normal type. Further and as yet unforeseen difficulties will occur. However, the project, if properly supported, is now at the point of consistent operation and good results.
>
> The Telegraph Mine Project has been started in a very good and effective manner. In the writer's judgment, this particular "startup" would compare very favorably to any similar mine initiation.
>
> It is the writer's understanding that a variable cut off grade based upon the price of gold has been imposed upon the Telegraph mining activity [this was by the Associates' Committee]. This requires the Operator to either waste valuable assets or spend considerable amounts of money to stockpile and conserve them. This type of situation can place an unsupportable burden upon the operation and it can actually result in the financial failure of the project. The present cut off grade should be replaced by a blended ore target grade based on realistic projections of the economics of processing the product.

Mr. Hughes also reported that the assaying should be tightened up and perfected-that the work was being done in a "standard and conservative manner" and that subject to any assay-controlled deficiencies, "the results of this program

are acceptable." This report was received for the limited purpose of showing the state of mind of the parties. The Court has also considered, on issues of fact as well as state of mind, Mining Engineer Daley's report as well as others.

56. During the months of October and November 1982, the Management Committee, pursuant to the provisions of the Joint-Operating Agreement and a "Telegraph Associates Resolution- -Management Committee," assumed general control of the operation of the Telegraph Mine. It issued a series of directives to the operating manager, many of which it attempted to carry out. These included the direction that Cascade proceed to obtain the fabrication and installation of carbon columns for the purposes of heap leach mining; proceed to sample hill number one by drilling sample holes; make such investigation as may be necessary to determine if and why CemCorp's atomic absorption assay results [CemCorp was Cascade's own laboratory] were divergent from those of other recognized laboratories which utilized the fire assay method; in the event the fire assay from Assay Laboratories differs from CemCorp's assays, utilize the fire assay results in determining the minimum standard for ore to be mined or processed; make a proposal for a monetary penalty to be incurred by Cascade for all ore mined and processed below this minimum standard; send weekly operating reports, including weekly income and expense statements to each member of the committee until further determination by the committee; meet with Martin J. Hughes, a consultant retained by the Associate Management committee for the purpose of reviewing the Telegraph Mine operations and making a report of his findings, as well as recommendations for change in such operations, and provide Hughes with any and all data he might request and cooperate with him and permit him to interrogate employees of Cascade; crush no additional ore until the entire present stockpile of the ore has been loaded on the

leach pads; not resume crushing operations until an automatic drive has been installed on the crusher stacking conveyer to assure blending of the ore; utilize a front-end loader to take loads from various parts of the stock-pile in loading front-end trucks, in order to achieve some degree of ore blending; not mine or process any ore containing less than $36.00 of gold per ton; determining the dollar value per ton by assuring a 100% recovery of gold from the ore and by using the average gold price for the preceding month; send out through independent assay laboratory (other than CemCorp) all samples for which CemCorp assays indicate a value of .5 ounces of au per ton or bettter and in any event send one out of each fifty CemCorp assays of ore going into the cement haulage trucks to Assay Laboratories at Salt Lake City, Utah, for a separate fire-assay.

57. On November 12, 1982, six Associates who are not parties to the present action notified the Management Committee that they revoked their powers of attorney and the rights given to the Management Committee to represent them, claimed serious mismanagement on the part of the committee causing damages to the protesting associates and affirmed "our rights in and to the Joint Operating Agreement with the Cascade Energy and Metals Corporation as Operating Manager, and reserve unto ourselves every right and privilege appertaining thereto." The next day Dr. Harold H. Masunaga, another Associate not a party to this action, similarly disclaimed the Management Committee's authority, stating that "your actions are gravely endangering my tax structure."

II-H. Weston's Efforts to Collect "Assessments" from the Associates

In prior sections of these findings the general contractual

background and related developments have been dealt with. But it is now necessary to recur more specifically to the basis and development of the dispute which arose between Cascade and the Associates concerning the former's attempts to assess alleged costs of further development and production, which finally led to the institution of the present action by Cascade and the breakdown of the mining venture.

58. On February 15, 1982, in a report to the Telegraph Mining Associates, Cascade stated that, as evidenced from the financial statement accompanying the report, the "predevelopment loan funds will be used up as scheduled about the same time as we are receiving product from the first 5,000 tons of ore leached at the mine site." While some of the Associates paid their so-called assessments and some refused, the circumstances were such as to leave unclear whether the payments made were on the strength of later reimbursement out of production, as a voluntary contribution to implement production, or as a recognition of personal liability beyond the development costs. I have inferred that the first-mentioned alternative was most probable.

59. On April 15, 1982, Cascade, per Weston, reported to Stoltenberg and Waugh as Telegraph Mining Associates Committee that, as was reported in the "March Reconciliation, the predevelopment loan funds, plus the interest accrued thereon, has now been expended in the work of predevelopment." It was added.: "In March we commenced production with the stockpiling of some 1,500 tons of ore." It was further stated:

> You will note that the statement, as shown for March, terminates the contractual obligation to pay 2% of expenses as a development management fee. The production expense, as shown on the statement for March and amounting to S24,493.99

is being invoiced directly to each of the Associate members (which equates to approximately $700 for the lst quarter on a per unit basis). With the facilities in place, it is anticipated that the sale of metals will commence in April. Until cash flow is able to pay directly the overhead costs and the cost of production, loans have been secured by W. David Weston and Cascade Energy and Metals Corporation, to meet the on going expenses with the understanding that the first proceeds of production will re-pay this production financing.

Each of the Associates [has been given] a notice that unless arrangements are made to pay for the costs of mining and processing, royalty, taxes and such other expenses as are incurred in the operation, the costs of mining will be billed to them directly on a quarterly basis and sufficient ounces of the production necessary to cover these costs will be sold. In the event any of the Associates should fail to make the arrangements necessary to take in kind the remainder, or separately dispose of their prorata share of the minerals produced from the operation, then Cascade would dispose of the same at the best available price, remitting the proceeds from the sale, less the cost of sale, to the Associate member.

Thus, the first mention of assessability for the cost of production was on the theory that if not paid, deficiencies would be taken care of out of the sale of the gold, and during a subsequent meeting when the matter of assessments was mentioned, it was in the context that those who did not pay their assessments could not get their gold.

60. On May 5, 1982, Stoltenberg replied to Cascade's April letter concerning his election as to the distribution in kind or in cash of the proceeds of production:

> ... I hereby elect to receive all of my distributions over and above production expenses, in kind (i-.e. in the form of gold and silver metal). The foregoing election would assume that (except for the $1,400 which was my share of the production costs for the quarter ended March 31, 1982, and which I paid to you in cash on April 2lst) Cascade would sell a sufficient amount of the gold and silver (in the ratio in which the said two metals are produced from the mine) otherwise allocable to my two (2) royalties to the lessor, the management fee, payments on the royalty note(s) and development loan, and the production costs, and such amounts as may be reasonably necessary as reserves for exploration, reclamation, further development of the property,,etc. and that the remaining gold and silver metal will be shipped to me in kind quarterly, or at such more frequent intervals as may be practical.

Stoltenberg and the other Associates not affiliated with Weston understood that any advances they had made or would make by reason of the so-called "assessments" were advances against production and did not represent any costs assessable of right except to be paid out of production.

61. In subsequent quarterly statements during 1982, Cascade claimed against each Associate its "share" of "production cost" assessments. The second quarterly billing listed for each Associate a total per unit of $5,781.39 for "Production Expenses" and $1,846.03 for Exploration and development Expense.

62. Under date of December 1, 1982, Stoltenberg, who by reason of his status as an attorney and a member of the Manage-ment Committee, and his liaison with Mr. Weston, had become the spokesman for the dissenting Associates, wrote to Mr. Weston with reference to the threats of Cas-

cade to begin the suit to collect the "assessments." Among other things he said:

> The threat letter from your attorney (which he apparently sent to other "non-paying" Associates) indicates a further absence of common sense, especially in view of the fact that I told you in the November 22nd telephone conversation (and I assume that Phil Bentz told you previously, since I had given him the same message on November 18th) that Bernie, Chris and I had decided to use our best efforts to obtain payment of the second quarter requests for money, and that preliminary inquiries indicated that most of the Associates would pay.

63. On December 2, 1982, Mr. Stoltenberg wrote Cascade stating among other things:

> Please be advised that your proposed budget for November, 1982, (copy enclosed) is disapproved and that among other reasons, the following items are either not justified or excessive: [approximately $35,000 in expenditures covering metal extraction process, fuel, assaying, insurance, tax, license, overhead, management and secretarial, maintenance equipment and electrolytic refining].

The letter concluded:

> The "Existing Bills" are also unjustified under the agreements, as Cascade had no authority to incur liabilities the value of minerals removed from the property.
>
> You are hereby put on notice that any expenses

> or liabilities incurred by you in excess of those which are payable from minerals removed from the property and sold, have been and will be incurred at your own risk.

Weston testified at the trial that this was the first notice he ever had that his advances of production costs were payable only out of the proceeds of production according to the view of the Associates.

64. On December 10, 1982, Stoltenberg sent a letter to all of the Associates reviewing the situation as it then appeared to him. Among other things he called attention to the statement in the Confidential Memorandum that "the operating Manager has no authority to enter into any commitment or obligation on behalf of the Purchasers or otherwise do anything which would subject the Purchasers, or any of them, to any liability in excess of the Purchaser's respective interests in the minerals mined, milled and removed from the property and the interests in any proceeds from the sale of the said minerals." He stated that "the non-assessable nature of the program has been confirmed by Larry Williams, the attorney who drafted the documents" who stated that he intentionally included the non-assessment provisions for the protection of the Associates, as he had done in other mining venture agreements he had drafted. Stoltenberg stated that after the non-assessment provisions were pointed out to Mr. Weston, he immediately changed his theory of liability to the theory that the Associates knew about the "advances" that Cascade was making and consented to them by failure to object and stated that such a theory ran directly counter to the provisions of paragraph 6 of" the operating agreement which required the Associates' express consent to be bound to repay any advances. He stated that it had been difficult to get any particular information from Mr. Weston in view of his predictions of sig-

nificant daily cash flows which were either in process or certain to occur soon and indicated that the Management Committee on September 13 had given Mr. Weston instructions to stop mining and crushing additional ore until certain events occurred and until later that month he stated Weston had stopped mining and crushing on September 21 "due to lack of funds."

65. Stoltenberg concluded as follows:

> In the case of a non-assessable program that encounters cash problems, logic and reason dictate that the promoter attempt to reach an accommodation with all involved, and if he suggests the payment of substantial additional cash by the investors, then he should be prepared to give substantial concessions, especially if he was responsible for the mismanagement or the miscalculations that created the problem.

Stoltenberg also commented on the possibility that pursuant to the Joint Operating Agreement a part of the Associates might commence their own mining operations on the property if they had "paid their billings" as Mr. Weston had suggested. Stoltenberg said:

> But I do believe that if, at this point, some of the Associates start their own operations, and in doing so, use, any of the facilities or improvements, or commence mining on any part of the property which has been paid for or partially or wholly developed using funds supplied by all of the Associates, then the non-participating Associates may well have the right to either enjoin such operations or to demand their share of any profits derived from such operations.

66. On December 14, 1982, Mr. Weston under the heading "Constancy Amid Change 'An Interpretive Opinion'" submitted presumably to the Associates a fifteen-page memorandum explaining his thesis that "the development and production were two separate and distinct phases with distinct provisions for funding by the Associates" and that "production costs were specifically to be paid by the Associates as has been called for as a reimbursement of the operator's expenses." He stated that the Joint Operating Agreement in effect provided that the purchaser had "unlimited" liability for production expense subject to only two exceptions: (1) the authority of the Associates to discharge Cascade as Manager, and (2) the prohibition in Art. 13(c) of the Joint Operating Agreement against the operating manager's subjecting the Associates 'to any liability in excess of the purchasers respective interests in the minerals mined, milled and removed from the property and their interest in any proceeds from the sale of said minerals." Calling special attention to the foregoing expression "minerals mined, milled and removed" and disregarding the reference to "sale of said minerals" he attempted to make determinative his estimation of the value of ore upon the leach pad which of course had never been "removed from the property," much less milled, so that he could justify his billing the Associates for production expense independent of any realization or assurance of realization from minerals mined, milled and removed from the property and any interest in the sale of such minerals in accordance with other specific provisions of the contract relating thereto.

67. This version, presaged but not delineated by Weston's initial attempted justification for the assessments as simply being for expenses which the Associates would have to pay if they immediately wanted their gold in kind rather than waiting for Cascade to sell it and deduct from the proceeds the cost of production, epitomizes a bald

manipulation unworthy of any manager, much less a fiduciary. Add to this the fact that Weston's play with the terms "development cost," "reproduction cost," and "make ready" production costs in an attempt to show that only the former would be covered by the development loan, leaving the latter to be assessable against the Associates, is belied by his projections in the Confidential Memorandum which show production as paying all types of production costs after expenditure of the development loan, and by the notes to the projections which refer to all types of costs relating to production, including preproduction, get ready production and production costs generally, interchangeably as being covered by the cash flow from sales.

68. Mr. Weston in his memorandum placed the burden upon the Associates to protect themselves from liability by directing the operator to stop mining operations when it was determined that the program was not economically viable. He stated that he had never represented or given to anyone an interpretation other than as he then set forth, "indeed, no one has formally requested an interpretation at any time until the Coastal Computer letter" within the preceding month. He suggested a sort of estoppel by observing that "there can be little doubt that the Associates individually or through their authorized agents were willing participants in permitting the Operator to advance funds and improve their assets without objecting and with full knowledge." And he concluded:

> PREPARATION OF THE CONTRACT AND MEMORANDUM. The memorandum and the contract documents were prepared by me, from examples submitted by Larry Williams (corporate counsel). Substantial alterations were made to the format submitted by Williams. The documents were all rewritten and processed on my word processor. The documents were repeatedly

reviewed, altered, and edited to fit our requirements and contract construction. Thereafter, there was a broad exchange of ideas until the documents were in a form that we approved and that expressed our understandings. The contracts were entered into by and between the Associates and Cascade. We are responsible for the intent and interpretation of our contracts, not Larry Williams, who was hired for his tax opinion and his legal advice in regards to the tax and security applications of the program. In illustration, we obtained from Larry an old suit of clothes which were the wrong style and color and didn't fit. After extensive alteration, redying and styling, the suit assumed a new look in fashion. The old suit merged into the new. In this instance the retailoring and new cut design happened not to be made by an outside tailor, but by the new designer/owner. This is as it should be for the new owner has to wear the suit and is responsible to support its appearance.

69. The issue was more sharply drawn between the variant concepts when Cascade threatened to, and did, file this suit and its November-December 1982 report was made, stating that no new ore had been emplaced upon the leach pad during the preceding two months "due to the lack of operating capital and a cohesive, directed program of support among the Associates." It was stated that operations at the mine were at a subsistence level and current production consisted of operating and maintaining the leaching system, the equipment and property. It was further stated that "encumbrance upon all Associates by those who failed to pay their fair share of the start-up production expenses since March was not resolved by mid-December, pursuant to notice" and that "the Operating Manager in protection of

its rights and in support of its obligations and responsibilities to all Associates, has filed an action (complaint) for recovery of the = amounts due the program." It was further stated:

> The suit claims a breach of the Operating Agreement under Paragraph 10 which provides for the reimbursement of the Operating Manager and the Associate's pro-rata share of all operating and other out-of-pocket costs associated with the mine. The Operating Manager has taken the position that the actions of the defendant Associates in breaching the contract constituted a repudiation of the Operating Agreement in its entirety.

70. Paragraph 10 of the operating agreement to which Cascade made reference as a foundation for this claim to reimbursement for production expenses read in pertinent part:

> 10. Compensation and Expenses of Operating Manager. The purchasers agree that the Operating Manager shall be paid as compensation for his services the sum of the following:
>
> (a) Reimbursement of its out-of-pocket costs of management incurred for the Program which shall include travel expenses and a fair allocation or pro rata share of operating, handling, managing and overhead expenses, including expenses for group insurance, safety, hospitalization and retirement, but excluding expenses for any profit-sharing payments.
>
> (b) As compensation in full for all services rendered, the Operating Manager shall receive an Operating Management fee of five percent (5%) of the gross proceeds of the ore mined and sold, (as that term is defined in section 3 of the Lease)

provided that such amount shall be accrued and become payable to the extent of cash available after payment of other expenses from the mining and milling of said minerals removed from the property.

(c) The Operating Manager shall be entitled to receive out of production a Construction and Pre-Production Development Fee equal to two percent (2%) of all costs incurred in the pre-production development of the Program, to construct and develop the property to the production stage.

(d) At the time each Purchaser executed this Agreement, the Operating Manager shall be paid $800 per Unit for legal, accounting and other services during 1980 in connection with its employment as the Operating Manager; thereafter, it shall charge each of the Purchasers the actual costs incurred for such expenses.

71. Paragraph 13(c) and paragraph 15 of the Joint Operating Agreement provided as follows:

(c) Notwithstanding anything to the contrary contained herein, the Operating Manager shall have no authority, express or implied, to enter into any commitment or obligation on behalf of the Purchasers or otherwise do anything which would subject the Purchasers, or any of them, to any liability in excess of the Purchasers' respective interests in the minerals mined, milled and removed from the Property and their interest in any proceeds from the sale of said minerals.

15. Actions by the Purchasers. Purchasers owning a majority of the Units shall have the power (i) to direct the Operating Manager as to the con-

> duct of the business of their working interests (ii) to adjust and pass on the Operating Manager's accounting, and (iii) to authorize and direct the Operating Manager in management decisions. Anything herein to the contrary notwithstanding, no Purchaser shall have any right to encumber or dispose of any other Purchaser's interest in the property of pro rata share of the ore mined, milled and removed from the Property.

72. On December 17, 1982, this action whereby Cascade sought among other things to compel the Defendant Associates to pay the "assessments" it was claiming and to obtain a declaration of Cascade's rights thereto had been filed. On January 10, 1982, Weston, for Cascade, wrote Mr. Stoltenberg cautioning him against the position that the Telegraph Associates' program was non-assessable. He stated, among other things, that "if personal liability of the participants is limited as it would be under your theory-the Association could possibly flunk the exclusion test where the Association might resemble a corporation," and added:

> If your theory is projected further, do you suggest that the Operating Manager is the party obligated for operating expenses beyond the development funds, since it is now evident that the Joint Venture is not obligated? The Associates must qualify as co-owners, each of whom are independently liable, to not be taxable as a corporation.

III. DISCUSSION, INTERPRETATION AND ULTIMATE FINDINGS ON CONTESTED ISSUES

73. From the evidence received concerning the subject matter and the subsequent relations and activities of the parties, the golem-like creature created by the convoluted contract documents has assumed clearer form. In the light of all of the evidence, including hundreds of other documents, extensive and sometimes sharply conflicting testimony, and reasonable inferences, the facts must be deduced as they bear upon the determinative issues. This is not to say that most of the parties and other witnesses with few exceptions did not generally attempt to tell the truth as they perceived it. But some of them from each side saw the truth primarily in the light of their own self-interest as they testified by hindsight, held within only broad limits by written correspondence and other documents which themselves were sometimes only imperfectly revealing. And there were imponderables which clouded the project from the beginning, some of which were listed as "risk factors" in the Confidential Memorandum. A circumstance of pervasive significance was the unpredictable and fluctuating price of gold, with significant declines from the time of the sale of the lease interests to the present time, upon which the venture so much depended at the beginning and the risk of which all parties assumed.

III. Profits from the Associates' Investments did not Depend Solely or Principally upon the Efforts of Others

74. The units sold to the Associates and the investments represented by those units did not depend solely upon the services, actions, or decisions of others for their value but on the contrary the Associates reserved and in actuality

exercised substantial, critical and effective control over the property sold, upon which the value and success of their investments essentially depended in connection with the services of Cascade as joint operating manager. 75. The ultimate right of management and control vested in the Associates by the contract documents is clear and unquestionable as the background review of their provisions has already demonstrated in my opinion. As the previous background findings concerning the control actually exercised by the Associates through their Management Committee has demonstrated, I believe, this right of control was not a mere facade or pretense, but on the contrary was of the very essence of the agreement both in respect to its assumed tax benefits and the ultimate control given to the Associates, a power that was exercised by them to a substantial degree and recognized by all concerned.

76. Herbert Stoltenberg's letter to Harry E. Fisher, dated October 29, 1981, furnishes but one of many examples. He stated that Chris Waugh had attempted to obtain an agreement from Weston for a voluntary turnover to Waugh acting for the Associates of the funds and other assets belonging to the Associates and that Weston had finally agreed. Mr. Stoltenberg wrote: "It was at this point that Chris, Bernie and I flew to Salt Lake City," and he further stated that "in our minds the main purpose of the trip was to take control of the Associates' assets and possibly to terminate Cascade as the operator of the mine (we had received powers of attorney from a majority of the Associates)." Stoltenberg testified at the trial that he believed that they had the authority to take control of the funds of the Associates and terminate the manager. It was only because they became convinced that Weston was acting in good faith and that their monitoring of the funds would serve the purposes of the Associates that Stoltenberg and the others having the power of attorney at that time did not

implement their original intention of taking over the funds and terminating the management upon approval of a majority of the Associates. In 1982, the new Management Committee, as before noted, went beyond the exertion of pressure and monitoring to actively assume direction of operations, and finally to order a shutdown of a part of those operations.

77. In sum, the offering of the promoters did not constitute a security; the investments of the Associates did not constitute securities; the sales to the Associates were not sales of securities within the contemplation either of federal or state laws. Williams in drafting his contributions to the documents initially considered that they were, while endeavoring to emphasize joint control rather than the type of single control inhering in a corporation, together with the controlling rights, and participation of the investors as bearing upon tax benefits. Irrespective of whether he was aiming at an internal contradiction, following the input of Weston and perhaps others, the documents emerged and were marketed clearly as something else, for under them the investors were not relying for their profit solely or essentially upon the efforts of others but upon their own direct and potentially determinative participation in management. In his deposition preceding the trial, Williams expressed some misgivings as to the validity of his initial opinion, but in any event on the basis of the evidence at the trial, I am of the firm opinion, and so find, that at least one essential element of a security, as well as that of the sale of a security, was lacking for reasons above stated.

78. The holding that no security within the contemplation of the federal or state acts was involved renders immaterial the question of whether the offering was a public one or fell within the "safe harbor" or other exemption provisions of those Acts. The evidence as to the latter issues has thrown light upon various remaining material issues in

its suggestion of the circumspection of the parties in limiting sales representatives to the information contained in the Confidential Memorandum, the depth of the participation of some of the Gold Technics Defendants in the selling venture, and the unreliability of some of Benzer's testimony and leaves unanswered why Weston would entrust Benzer in the early stages of the venture with the responsibility he apparently did, and why, if the offering were thought to be a security outside the exemption of any "safe harbor," no claim has been made by the Associate Defendants against any of the Gold Technics Defendants for liability that could arise as a matter of law for failure of registration by them and their joint venturers who made the offering. As to the latter enigma, I have restrained by curiosity, and have struggled first in endeavoring to properly weigh related evidence material to issues in the present case.

III-B. There was no Actionable Fraud or Misrepresentation in the Initial Offering and Sale of the Interests in the Mine

79. The defendants and cross-claimants would have me find that the Confidential Memorandum falsely, willfully and materially represented or omitted facts necessary to render that which was represented not misleading, that is, that the Telegraph Mine claims contained a "highly probable" ore body of approximately 540,000 tons with an average grade of .51 ounces of gold and approximately 2 ounces of silver per ton; that cash flows projected for investors beginning in 1981 and totaling $1,137,339.00 per investment unit by 1991, were based upon tonnage figures and average grades which were erroneous, misleading and overstated on the high side and the operating costs included in the financial projections were severely understated and inadequate to undertake the mining operation described in

the Confidential Memorandum; that David (Weston and Cascade had the experience and ability to place the mining operation described in the Confidential Memorandum into production when in fact Weston had never placed a mine into production; that an underground mining and milling operation would be commenced and placed into production with the $800,000.00 investment loan whereas Weston never intended to commence underground mining as described and knew at the time of the offering that $800,000.00 was insufficient to place the Telegraph Mine into production, and that a representation that federal tax deductions for 1980 equal to approximately 280% of investor cash contributions would be available to each investor was fraudulent. I am urged to further find that there was a fraudulent failure to disclose that Cascade had acquired the Telegraph Mine for $100,000.00, the existence or nature of Weston's previous SEC violations and litigation with other parties, and the appendix to the Tomo Ito report which it is asserted was fraudulently omitted from that report as it was set out in the Confidential Memorandum.

80. Considering the sheer extensiveness of the statements, supporting data and other disclosures contained in the Confidential Memorandum, the exploration of the claims of Benzer and Halverson which were investigated, although largely rejected by the Associates, as early as 1981, the friction renewed as a result of the unauthorized levy of "assessments" against the Associates, the further investigation and the joint management undertaken by the Associates' Committee thereafter with additional access to the details of Cascade's operations, the final opportunity for specification of claims by the Associates long after cooperation efforts had ceased, the heat generated by this litigation, the apparent assumption by the Associate Defendants and cross-claimants that the offering of a security was involved with its further encouragement of multiplying claims, and

the inherent risks of the mining business, including inherent risks of misunderstandings, it is as notable that other charges of misconduct have not been made as that the claims made have been asserted with such convolutions and confusion. They boil down to only few of substance in the context of common law fraud. Most do not warrant extensive comment. Two, relating to the representations concerning ore reserves and the sufficiency of the development fund for the production of ore, are matters of serious concern.

81. The omission from the Confidential Memorandum of mention of the Preston Parkinson v. David Weston and the Gwen P. Weston v. David Weston lawsuits did not constitute a failure to disclose facts necessary to render the other facts disclosed not, misleading. The latter suit was commenced after the sale of the units, the former was filed in October 1969 and settled in 1971, almost nine years prior to the publication of the Confidentiai Memorandum. I precluded retrial of the merits of thislitigation, on the theory that with or without it the outcome would have limited materiality except for needless consumption of time. The alleged failure to disclose securities violation occurring some six years earlier did not constitute a material omission in view of Weston's more meaningful securities problem that was disclosed.

82. The omission of the appendix to the Tomo Ito report was not shown by the evidence to have been intentional; on the contrary, the preponderance of the evidence indicates that such omission was inadvertent, and in view of the indications in the Owens and Tomo Ito reports that the assays in question were not of substantial significance, would have had no bearing or effect upon the investment judgment of the investors who obviously were looking primarily to the text of the Tomo Ito report as confirmed by the Owens report. Hodowski and Waugh had seen the

Tomo Ito report in full prior to its incorporation in the Confidential Memorandum. The absence of the appendix was explained to the general satisfaction of the Associates at the Associates' meeting on September 24, 1981, and the full contents were then available to all interested parties, if not before. It was not until after the present suit was filed that there was any claim by any Associate to a right to rescission of the related contracts on that or any other ground. Far from the disclosure of the missing appendix proving material to his investment judgment, in December 1981 Stoltenberg purchased an additional unit for himself and his brother. The absence from the Confidential Memorandum of the price of $100,000.00 originally paid by Weston for the mining claims was not significant in view of remoteness and the substantial abandonment of the property at a time when gold was controlled at $35.00 per ounce.

83. Neither Weston nor Cascade was shown to have made any false representations concerning their ability or experience or that any such representations should be taken as some guarantee of the success of the venture. There was additional information that could have been given, as revealed at the trial, indicative of their capability and experience which were impressive, and other information that could have been given indicating limitations of experience and ability, which might be true of any prospective manager. A number of purchasers had known Weston for years and observed his capabilities, experience and operations firsthand. Generally, there was a reasonable and fair description of background and experience in the Confidential Memorandum which was essentially factual. Because the mining venture did not turn out as it was hoped it would did not render that which was said insufficient or misleading and did not constitute the breach of any guarantee of success, for, indeed, there was none in this venture of disclosed risks.

84. While in retrospect Weston's projections were overly optimistic and unreasonable, particularly in view of the subsequent change of immediate emphasis to heap leaching operations, the Confidential Memorandum made clear that they were mere theoretical projections on assumptions based upon the geologists' reports and a judgment as to the future price of gold. The proof is insufficient to establish that they were not reasonably believed by Weston to be justifiable projections at the time in light of those assumptions. Among other things, the Confidential Memorandum advised prospective investors:

> Mining Reserves. Although geological reports, surveys and drilling done on the Property indicate the existence of recoverable gold and silver reserves on the Property, there is no assurance that such gold or silver reserves in fact exist to the extent indicated in the financial projections and elsewhere in this memorandum, nor that such reserves are physically or economically recoverable in the quantities indicated.

85. The charge that Weston and Cascade falsely represented the ore content of the mine requires more extensive analysis despite the common law rule that fraud is not to be presumed and it was the burden of the Associates and Gold Technics Defendants, to prove fraud by clear and convincing evidence. It is essential to examine not only the representation on page 9 of the Confidential Memorandum, which is at the heart of the claims of misrepresentation and concealment, but also its context.

86. Immediately above the representation in question, there were summarized figures in the Confidential Memorandum based upon geological reports concerning the "results of the 1969 drilling" north of the number 2 shaft and between shafts 1 plus 2, less dilution factors, totaling

72,000 tons. There is no real question but that this constituted an established body of ore on the basis of the geological reports to which the terms "measured," "proven," or "blocked out," reasonably could have been applied. Then immediately following was the statement at the heart of the dispute as it appears on page 9 of the memorandum:

> In sum, a consultants report indicate [sic] proven and provable reserves of approximately 72,000 tons of minable and merchantable ore including highly probable reserves of 540,000 tons as a part of an additional inferred ore of 1,012,500 tons. (See Geologist Report dated March, 1980, Exhibit G).

87. Attached to and forming a part of the Confidentiai Memorandum was the aforementioned Exhibit G dated March 15, 1980, entitled 'Geologist's Report and Mine Costs Study" by Joseph Owens. Its subject matter was set out under the headings of Summary, Purpose and Scope, Previous Exploration and Reports, Field Work, Location and Accessibility, History and Development, Geology, Mineralogy, Stratigraphic and Structural Control, Grade of Ore, Tonnage Estimates-Measured Ore, Inferred Ore. Illustrations appended to the report were of Major Western Lineaments, Property and Drill Hole Location Map, Topographic Base Map and Plan and Profile. Appended and frequently referred to in the Owens' report were copies of the previous reports of Tomo Ito. The character, qualifications, independence or credibility of Owens and Tomo Ito were not impeached or thrown into substantial question by the evidence, although some of the witnesses for the defendants and cross-claimants at the trial disputed Weston's interpretation of their reports. Owens who testified at the trial was of the present view that there was a

total of 1,012,000 tons of possible ore and that included in that amount were 540,000 tons of probable ore and 72,750 tons of proven ore "that Mr. Tomo Ito came up with." Dr. Jensen was generally of a similar view. Sharply disagreeing, without directly attacking the Tomo Ito report was the testimony of geologist Hansen, called by defendants and cross-claimants, who questioned whether there was any "proven," "measured," or "probable" ore at all at the Telegraph Mine by applying his own peculiar definitions of those terms with little investigation or opportunity for observation and on the basis of his rather arbitrary and unreasoned notions of nomenclature.

88. The Owens' report stated under the heading, Tonnage Estimates-Measured, that "Measured tonnage estimates based on approximately 2000' of OME [Office of Mineral Exploration] drilling were calculated by Tomo Ito and are noted to be extremely conservative." The Owens' report continued: "As reported in 1968 by Ito, two ore zones were blocked out during operations and are reproduced below," the report setting out a table of total "measured" tonnage, less dilution factor and mined stopes, of 72,750 tons with a "[v]alue based on Au, Ag average prices for February 1980 of $26,597,400.00.' Under the heading, Tonnage Estimates-Inferred Ore, the Owens' report stated:

> As indicated by stope sampling, intensity of alteration and open-ended ore zones several reasonable projections of the Telegraph ore Zones can be made. Within the area of the drilling undertaken in 1969 because of the intensity of the alteration and the open-ended ore zones on either side of the drilling and of alteration estimated to extend to depths of at least 450', a proposed ore zone of 540,000 tons i-s expected. With consideration for displacement the gross value of this inferred ore zone would be approximately $146,240,000.

> It also appears reasonable to project because of the open ended ore zones and the strong lineation that is evident between the Telegraph Mine and the Pomona Mine which trends in a north easterly direction and appears to intersect several mines northwest of Interstate Highway I-15, an ore target along the strike of the vein within the present claims as follows: ... Less Dilution Factor 25% =,012,500 tons. Assuming values to existing ore and using March 1980 metal prices 1,012,500 tons at $365.60/ ton = 370,170,000.
>
> This target projection is based on previous stope sampling and on observed intensity of alteration in lower workings. Hydrothermal alteration of this nature is frequently found to be regionalized rather than localized.

89. The Tomo Ito report, a copy of which was attached to the Owens' report as heretofore indicated, was presented under the headings: The Telegraph Mine, History, Principal Features, Mine Workings, and Exposures, General Geology, Mineralization, Tenor of the Ore, Metallurgy and Beneficiation, and Conclusion. The Conclusion of the March 1968 section reads:

> More ore bodies are expected to be encountered, because of: (1) the persistence and strength of the structure (shear zone), (2) the length of the shear zone, (3) the many large quartz outcrops indicating massive vein matter, (4) the many mineralized cross-veins (although small) on the surface, and (5) the relatively small area, even between the two working shafts, which have been explored only to a limited extent.

90. An "Operator's Final Report" was signed by Tomo Ito on April 18, 1969, reporting a drilling program apparently completed by W. S. McGilvray, Jr., and Morgan McGilvray on contract and stating as the basis for the identification of two blocks of ore approximating 72,000 tons:

> The results of the drilling indicates good vein structure to at least a depth of 200 feet on the dip from shaft No. 3 southward to No. 1. For our ultra conservative figuring, orebody is assumed only for 150' to approximately the estimated water table.

The following further observations were made:

> In the drilling process, determination of the vein structure, its thickness, attitude, and composition can be made with a fair degree of accuracy in most types of rocks. However, tenor of ore is most difficult to assess unless in rare cases where the values are evenly distributed in a gangue in which 100% core is available.
>
> Where the values are contained in finely broken and crushed portions of the vein, core recovery is poor and the sludge can be highly diluted. The more shallow holes, such, as 9 and 10, gave evidence of better recovery of values and less dilution of sludge.
>
> Our original plan and projection was based on an average gold content of .50 oz/ton at $35/oz. This conservative figure was adopted after many surface (outcrops, cuts, and holes) and underground (old workings - stopes, etc.) samples were taken and assayed. These results and careful review of

the old records justifies our assumed average value or tenor of ore. To further substantiate our position, a series of samples were taken near the conclusion of our exploratory program, similar to those taken from time to time in the past. This series as shown as Supplement to Appendix A, include samples 2701-2708 inclusive (note: These samples not at expense of OME-costs borne by McGilvrays) excluding 2707. The average gold content of the 7 samples is .51 oz. and the silver is 1.16 oz. On the basis of $40.00 gold ... and $2.00/oz silver, .51 oz/ton is valued at $22.72 per ton. 72,000 tons of ore at this price has value of $1,635,000.

91. Under the heading Observations and Conclusions Tomo Ito further stated in the Operator's Final Report dated April 18, 1969:

> In most cases, drilling results were good, but the writer strongly feels that true information as to values contained is not obtainable in certain types of formation such as encountered at Telegraph. This is especially true when highly fractured vein material with powdered oxides of manganese and iron, together with soft, light carbonates (calcite and siderite) are encountered. This is the type of material most likely to carry high values as shown by sample 2708 (Supplement to Appendix A). Sludge samples submitted where core loss was especially high also may not indicate true values due to heavy dilution. This is particularly true with the deeper holes.
>
> The core drilling program did produce sufficient evidence of vein structure to make it possible to estimate an ore reserve of 72,000 tons of ore. If the ore persists to a depth of 200' on the dip as

indicated by the drill considerable more ore can be added to the reserve. This justifies a beneficiation plant (mill) of modest capacity - 30 to 50 tons. However, such an investment cannot be recommended or even considered until more exploratory work is done.

92. The most difficult problem of intent or scienter is presented by the conflicting testimony concerning "development" versus "production" expense and Weston's at least implied representations that the mine's underground workings could be placed in "initial" production by the expenditure of the development fund represented by the notes of the investors. I have found no direct representation clearly indicating that there might not be additional development expense to be paid out of accruing production profits. On July 28, 1981, in asking for approval of the new surface operations, Weston stated that theearly profits could be "used to suppliment [sic] the pre-development loan funds to assure the continuing full development of the shaft and underground mining operations." He explained, however, that the high interest rates were causing equipment costs to rise appreciably. In this connection it is to be observed that in the mining plan included in the Confidential Memorandum "mining costs" include a listing of equipment in the amount of $919,377.00. There is little to point up any precise amount of development costs in view of other statements in the Confidential Memorandum already referred to and the understanding given to investors that if there were any deficiencies in either the development or production expenses they would be made up by subsequent production, including the revised agreement concerning heap leaching in alteration of the original plan of operation. To add to the uncertainty on this point is the discrepancy between the promoters' belief as expressed in the Confiden-

tial Memorandum concerning the sufficiency of the $800,000.00 development fund for "the initial development work" to get the mine into production and the "knowledge" of Weston prior to December 31, 1980, that the "cost of placing the mine into production would be more than $800,000."

93. On page 12 of the Confidential Memorandum, the following was stated concerning development expenses:

> Development Expenses: Pursuant to the Joint Operating Agreement, the Operating Manager has agreed to perform the task necessary to develop the property, on a best efforts (as more fully set forth in Exhibit D [the Joint Operating Agreement]) to the point of bringing the mining claims into production. The Operating Manager will be compensated for its expenses up to and including the sum of $800,000, as necessary, which sum will include a Construction Management fee of 2% of all amounts so expended.
>
> While the Operating Manager believes that $800,000.00 is the maximum which will be required to expend for the initial development work to get the property into production, there can be no assurance that additional funds will not be required. In such event, it is expected that the funds would be available from production as the development work proceeds.

In their request number 26, the defendants and cross-claimants asked Cascade to admit 'that prior to December 31, 1980, W. David Weston knew the cost of placing the Telegraph Mine into production would be more than $800,000,' and Cascade's response to the request for admission 26 was: "Admit."

94. It is unfortunate that this possible discrepancy was not meaningfully explored by either side during the trial but largely left for exploitation or explanation to the final argument. The context of the admission was not addressed by any offer in evidence of the immediately preceding or following demands and the responses thereto. Weston's counsel in his post-trial brief makes the point that Weston's admission was based on the inclusion of costs for building a mill by the joint venture, not with Associates' funds. The record shows that in addition to the $800,000.00 there was accumulated as interest before full expenditure an additional amount of approximately $75,000.00 which may have been contemplated from the beginning as part of the fund. Nor did any party explore at the trial, or even note in argument, that a belief that $800,000.00 would be sufficient for initial development work to get the mine into production is not necessarily inconsistent with knowledge that to place the mine into production more than $800,000.00 would be required, if the extent of the production was a variable or the source of some of the development cost was to be from early production profits. Weston did testify that the cost of equipment exceeded the amount he had anticipated by fifty percent. He testified he was going to buy for cash or credit. He said the predevelopment loan was "more than enough" to drill 200 plus feet-not 400 plus feet.

95. The Gold Technics Defendants would have me find that Weston individually and through his controlled entities falsely represented to them, both prior to and after the January 1979 and September 1980 agreements, that he and his entities were knowledge- able and experienced in mining exploration, development and production; that the forty-percent interest in the Telegraph Mine to be purchased was not burdened with onerous lease provisions; that Weston and his entities would develop the Telegraph Mine for the benefit of Gold Technics Defendants; that Gold Technics

Defendants would receive their pro rata share of profits, revenues or assets, and that the actual and market value of Rex Montis stock was $2.00 per share. For reasons implicit in what I have already found, and by reason of the failure of the Gold Technics Defendants otherwise to sustain their burdens of proof with regard to these allegations, the Court finds that there were no intentionally false representations of the nature claimed which were relied upon by the Gold Technics Defendants to their detriment, without prejudice, however, to the Court's determination upon a full accounting among the parties whether the Gold Technics Defendants have received their proper share of profits, revenues or assets from the joint venture or their stock ownership in Rex Montis.

96. The investors were told in almost every conceivable way of the legal and practical risks with respect to tax benefit expectations. With reference to the question of the economic viability of the Telegraph Mine in relationship to the Associates' interests, it is significant that most, if not all, of the investors who testified on the point continued to insist that they were maintaining their claim to tax benefits from the project as initially conceived on the theory that the mine contained valuable ore deposits and was economically viable in general agreement with the initial projections. It seems also not without significance that the Gold Technics Defendants are contending in this lawsuit for restitution of their full interest in the mine pursuant to their initial contract for sale of seventy-five percent of their forty-percent interest in the prime lease to Rex Montis. They insist upon their good faith in becoming parties to the venture on the basis of the Tomo Ito and Owens reports on which the Confidential Memorandum was expressly based, but attack Weston's good faith in relying upon those reports without any substantial evidence that he had superior knowledge with respect to their reliability.

97. As to all of these and related matters, the defendants have failed to sustain their burden of proof of establishing that Cascade, Rex Montis or Gold Technics, and those acting with them, did not make their representations in good faith based upon the reports of the geologists, and there is no showing that the geologists whose reports were set out in the Confidential Memorandum did not act in good faith or connived with them concerning, or were parties to any deception. The preponderance of the evidence supports the substantial accuracy of the geologists' reports on the information then available, considering that mineral discovery, evaluation and mining are not exact sciences. That Weston continued to have faith in the program at least into 1982 is indicated by his personal and joint venture contributions after the development fund had been exhausted, by Waugh's testimony that when he asked Weston 'where the ore was," Weston offered to buy him out for $29,000.00 and presented a cashier's check for this amount which Waugh refused because 'it was not enough,' and many other circumstances shown by the evidence.

98. Following submission of the case by the respective parties for decision and the firing of the Court's initial Findings of Fact and Conclusions of Law, counsel for the Defendant Associates has argued that the evidence would at least warrant or require a finding that Weston and Cascade were guilty of "negligent misrepresentation" within the contemplation of California Civil Code S 1572(2). Notwithstanding that the defendants and counterclaimants mentioned that section in their trial brief and in this connection the term 'negligent misrepresentation," the case was tried and argued by them on no such theory, and the issue was not reserved in the pretrial order either as an issue of fact or law. On the contrary, all related issues reserved were based specifically upon claimed securities fraud or common law fraud: "[Contested Issues of Fact[[4]18. Were

the misrepresentations and omissions of fact allegedly made by those identified in paragraph 7 above, intentional and made for the purpose of inducing investors herein to purchase the subject securities?... 19. Were the acts of those identified in paragraph 7 above fraudulent, malicious, or in conscious disregard of the rights of the investors herein?... 29. Did the alleged misrepresentations and nondisclosures allegedly made in connection with the offering violate California Corporation Code Section 25401? [dealing with securities] .... 41. Were misrepresentations and nondisclosures made which violated California and Federal securities laws and who made such representations and nondisclosures? [Contested Issues of Law] [5]13. Have those identified in paragraph 11 above violated California securities laws, including Corporation Code Sections 25110 and 25401?.., 18. Were any of the misrepresentations and/or omissions that were allegedly made by each side material, intentional, and/or fraudulent?"

99. This belated claim of negligent misrepresentations has presented yet another problem difficult for the Court, the evidence having been closed for both sides except as to the accounting and related issues reserved. I have decided, nonetheless, that the defendant and counterclaimant associates have not sustained their burden on any possible issue of negligent misrepresentations both because that issue was not reserved in the pretrial order and was not included in the theory on which liability was tried and because on the basis of the evidence received they failed to sustain their burden of proof by a preponderance of the evidence. Several of the reasons for this are implicit in my findings as originally filed and herein confirmed, and the Court further finds that the representations in the offering were in reasonable reliance upon the geologists' reports to which they were essentially limited, were not established to be materially incorrect, and were accepted and confirmed

by the Associates and their committees after substantially all of the questions as to unreasonable inaccuracy now argued had been raised by Benzer.

100. With reference to the risks of the venture which were outlined in the Confidential Memorandum and assumed by the investors, the Court is mindful of legal and equitable considerations which preclude promoters from insulating themselves from liability for fraudulent misrepresentations by reciting in small print or otherwise risk factors relating to the dangers of the investment. But the good-faith recitation of variables or uncertainties inherent in the nature of an operation may bear upon the question of whether, indeed, there has been a representation to the contrary, the reasonableness of any representation and the intent or lack of intent on the part of the promoters to mislead or deceive and may, depending upon the circumstances, be the badge of fraud, or a badge of fairness andcandor.

101. Weston and Cascade were no doubt guilty of errors of judgment in their initial evaluation of the immediate minability of the underground ore and in the ultimate realizations projected; and in their subsequent claim that the documents of contract provided in effect for assessable personal liability of the Associates for development and their use of a portion of development funds for unauthorized purposes they acted wrongly. But I have concluded that the evidence is insufficient to prove that their initial conduct was with fraudulent intent or scienter. The venturing by Cascade and Weston of their own resources and those of the joint venture without any assurance that they would be reimbursed other than through production is a further indication to the Court of Weston's confidence in the ultimate success of the venture and the good faith of his representations with respect thereto. The whole initial venture simply did not bear the badges of a fraudulent

enterprise at its inception for reasons heretofore indicated. The defendants and counterclaimants having the burden of proof, and securities not being involved, in the absence of preponderating evidence, much less clear, satisfactory or convincing evidence to the contrary, the Court will not presume fraud.

102. In view of failure of the complaining parties to meet their burden of proof with respect to the alleged misrepresentations or concealments charged by them, the Court finds generally, except as otherwise specifically stated, that to the extent they were made or were implicit in the general plan of operation set out in the Confidential Memorandum, no scienter or intention to deceive or mislead existed on the part of Weston and the interests he represented; that there was no negligent misrepresentation; that there was no showing of excusable ignorance of misrepresentations on the part of the investors; that there was no justifiable reliance upon any allegedmisrepresentation, and that any absence of information or material now complained about would not have had significant effect upon the investment judgment of reasonable investors and particularly of the Associates who committed themselves to the venture in good faith knowing of the risks and with the expectation that they might achieve high profits in tax benefits and otherwise or lose their initial investments and tax benefits by reason of those risks.

III-C. The Associates were not Personally Liable for "Assessments' and Plaintiff's Related Complaint Fails

103. Included in the report of Weston to the Telegraph Mining Associates Committee dated April 15, 1982, were thefollowing statements in addition to those quoted in part II indicating that Weston then believed that the hope of placing the mine into profitable production and reimburs-

ing advances made or secured by him and Cascade depended upon substantial additional financing from the Associates which could be induced by holding out prospects of production out of which such advances on the part of them and the Associates might be paid.:

> With the facilities now in place, it is anticipated that the sale of metals will commence in April. Until cash flow is able to pay directly the overhead costs and the cost of production, loans have been secured by W. David Weston and Cascade Energy and Metals Corporation to meet the on going expenses with the understanding that the first proceeds of production will re-pay this production financing.
>
> Each of the Associates, with the last quarters report, are being sent a summary of the pre-development loan fund expenditures to date. In addition, a notice that unless arrangements are made to pay for the costs of mining and processing, royalties, taxes, and such other expenses as are incurred in the operation, the costs of mining will be billed to them directly on a quarterly basis and sufficient ounces of the production necessary to cover these costs will be sold. In the event any of the Associates should fail to make the arrangements necessary to take in kind the remainder, or separately dispose of their prorata share of the minerals produced from the operation, then Cascade would dispose of the same at the best available price, remitting the proceeds from the sale, less the cost of sale, to the Associate member.

104. It is my opinion that despite other complications in the documents purporting to govern relationship of the parties and their responsibilities and liabilities toward each

other, there was no lack of an initial understanding among them, including Weston, that once the mine was in production it would produce sufficient cash flow to assure not only the production costs but profit for the parties in accordance with the projections. This is the only explanation the Court can find for absence in the contract documents of any means or mechanism for paying production costs except out of the realizations from production, indeed, for their negating any personal responsibility for such payments on the part of the Associates except out of the proceeds of production and with the inherent rectifier of putting it within the power of both the manager and the Associates as such to bring operations to a close when not sufficiently successful to provide for a profit above expenses.

105. And one of the important indications to the Court of Weston's good faith in the beginning is the very absence of such provisions and his subsequent willingness to commit his credit and that of interests he controlled to raise funds to keep the operation going without any real assurance of any reimbursement except from production. But I find that there came a time when his confidence turned from profits from production to unjustified insistence that the Associates subsidize Cascade operations and advances independently of any expectation of reimbursement from production.

106. The Court finds that the Telegraph Associates were obligated and liable under the Joint Operating Agreement and sublease only for the minimum annual royalties and their pro rata share of the $800,000.00 predevelopment loan and had no contracted to be liable for the personal assessments which Cascade sought to collect beyond and aside from profits from production. Cascade and Weston on their own or for the joint venture incurred additional operating expenses for which they now seek reimbursement through 'assessments' but there was no promise or representation

by the Associates that they would pay the operating expenses relied upon by Cascade prior to Cascade's obtaining their loans or incurring the expenses other than from proceeds from the production of gold. The loans obtained by Cascade were voluntary, without express consent, initially without even the knowledge of the Associates and were in justifiable reliance by Weston and Cascade only upon the prospect of obtaining reimbursement from production, aside from the question of responsibility of the joint venture to the extent they represented that venture.

107. Weston testified at the trial that the only way the Associates could have terminated their continuing obligation to pay Cascade's assessments was by default of their royalty obligations or Cascade's discharge as joint operating manager by majority vote of the Associates. Such an interpretation seems especially bizarre and oppressive not because the Associates had no power to discharge the manager or to bring their royalty obligations to an end by default, but because it indicates that Weston sometime in 1982 had developed the idea that without reference to profitable production of the mine Cascade could secure continuing financial advantage through claims to the assessments that he must have then known were not justly due under the agreement except out of production.

108. With this knowledge, payments of assessments were received by Cascade from a minority of Associates who are parties here in varying amounts and the other defendants and counter-claimants failed and refused to pay any of the so-called assessments. Treatment made of the "assessment" payments actually made will be reserved for the accounting hereafter ordered.

III-D. Plaintiff has Shown no Entitlement to Recover on a Quantum Meruit Basis against Defendant Associates

109. The Telegraph Associates were obligated and liable, under the Joint Operating Agreement-and Sublease, solely for the minimum annual royalties and their pro rata share of the $800,000.00 predevelopment loan, and were not contractually liable for any "assessments' as aforesaid. Cascade had effectively expended or transferred the entire $800,000.00 predevelopment loan by the early part of 1982. Cascade and Weston then obtained loans beginning in February 1982 and continuing in March and early April 1982 and did not advise the investors in advance that they would look to the investors to pay the operating expenses or loans if gold production was insufficient to pay them. To the contrary, all of Cascade's communications with the investors advised them in effect that production expenses ultimately would be paid out of production and it was implied that any investor payments would be interim financing or in order that they could receive their corresponding gold production in kind. Cascade on its own incurred operating losses for which it now seeks payment through "assessments." The loans and continuing operations were for Cascade's own expected benefit and/or that of the joint venture. The Joint Operating Agreement specifically provided at paragraph 6 that Cascade was not empowered to modify the agreement or to 'borrow money or execute notes or other instruments of indebtedness binding the Purchasers of said units without the express concurrence of the Purchaser of said units...,' which concurrence was not received. The participation of the Associates' management committees in the expenditure of such funds did not estop

them or, the Associates from contesting their reimbursement because of the frustration by Weston of the purposes and intent of continued operations of the contracts through unjustifiable assertions of liability on the part of the Associates, his holding out prospects of profits out of production which were illusory, and the de facto expiration and termination of the subleases as hereinafter found. Cascade's improper attempt to saddle obligations upon the Associates for which they were not obligated under the circumstances cannot be' implemented by the Court either under theories of quantum meruit, promissory estoppel, unjust enrichment or at all. These findings are qualified by, and without prejudice to, possible liability of Gold Technics Defendants for some of these expenses on the theory of contribution or quantum meruit, to be further considered as a part of the accounting to be ordered in this case.

III-E. No Tort or Negligence Liability between or among the Parties has been Established

110. None of the cross-claimants or defendants was guilty of making false or defamatory statements of or against any other party which were not privileged, nor did any of them tortiously or otherwise interfere with any contract or prospective economic advantage without the privilege so to do under the law and no party herein is shown by the evidence to be entitled to damages for any tort against any other parties or party. The communications and dialogue by the parties concerned with reference to the operation of the mine and of rights or obligations in connection therewith were at times robust, pointed, critical, to an extent speculative or exploratory, and sometimes vituperous, but all of this was within the realm of legality in the Court's

opinion and those claiming damages therefor have failed in their respective burdens of proof.

111. Aside from the question of accounting and any mis allocation of obligations, debits, credits or funds, and aside from the question of whether the conduct of Cascade and Weston frustrated or terminated the sublease and obligations thereunder, the Court cannot find by a preponderance of the evidence that Cascade was guilty of actionable negligence in its services as Joint Operating Manager, particularly as they were monitored, supervised or controlled by committees of the Associates, and thus finds, by reason of failure of proof, that the plaintiff was not negligent and that neither the defendants nor the cross-claimants are entitled to damages for negligence in the operation of the Telegraph Mine.

III-F. Rescission is not Warranted

112. The defendants and cross-claimants have asserted that the Working Interest Agreement and Sublease were breached by Weston and Cascade by proceeding with mining activities without any evidence that there existed minable and merchantable gold and silver and by reason of the failure of the efforts of "an incompetent and inexperienced promoter.' They claim that Cascade and Weston breached the Joint Operating Agreement by operating at a loss and seeking to commit the investors to operating losses far in excess of the investors' interest in the minerals mined, milled and removed from the property and accordingly seek rescission of the contracts ab initio. I have already sufficiently indicated the reasons for believing, and hereby finding, no grounds for such rescission have been established as distinguished from the recognition of termination of the

sub-leases and future obligations thereunder.

113. There are insufficient factual, legal and equitable bases established by those having the burden of proof for rescission of either the sale to the predecessor of Gold Technics of its interest in the Telegraph Mine or the sale by Gold Technics to Rex Montis of a portion of that interest. Neither seller has done or offered to do equity in connection with any such attempted rescission. All claims for rescission and restitution of consideration are inextricably involved in the other issues of this litigation and the incomplete accounting among the parties. Neither seller sought to exercise any right of rescission it may have had within a reasonable time or before it had made irrevocable elections with knowledge of the facts, and both have waived any rights to rescission by delaying its timely assertion and taking action and receiving benefits inconsistent therewith in the meantime. The original claim to recission was outlawed by the California statute of limitations. I am not unmindful of the offer purportedly on behalf of Rex Montis after this litigation commenced to rescind the purchase from Gold Technics and of the purported acceptance by Gold Technics more than a month thereafter. The "offer" was not signed but was transmitted to Harmatz and presumably the other members of Gold Technics by a letter dated January 25, 1983, from an attorney representing Rex Montis; it specified that acceptance had to be within thirty days after receipt. The purported acceptance was mailed by Harmatz to Weston on March 3, 1983, with a notation that it was signed by 'all but two of the partners," (which was a majority authorized to act for the partnership) but was on the express condition that it would cancel the right of Rex Montis to a thirty-percent interest in the Telegraph Mine and with the request that Weston acknowledge forthwith in

writing his agreement with this interpretation (which had been placed in doubt by the letter transmitting the "offer"). No acknowledgement of this condition appears of record. The delay in responding to the purported offer, superimposed upon the prior delays, the failure of Gold Technics to restore or tender the consideration for the original agreement and any benefits received as a result, its unreasonable speculations upon developments at the mine and the changing fortunes of the litigation, and other related circumstances, render the purported offer in course of the litigation little more significant as a waiver than the unconsummated request on purported behalf of the Defendant Associates for an extension of their royalty note "obligations" for force majeure was a bar to my determination that the sublease obligations should be deemed already to have expired. Rex Montis will be deemed to hold the 480,000 shares of stock in trust for Gold Technics, subject to accounting for the initial purchase price of Gold Technics' interest in the mine and the other matters of accounting among the parties hereby reserved.

114. Nor do I believe that Cascade for itself or on behalf of the joint venture is in a position to assert any claimed breach of contract as a basis to rescind the interest of the Defendant Associates in the mine and yet to hold them for unpaid rental or royalty or development note obligations, under the circumstances peculiarly applicable to those Associates and because of application of the doctrine of unclean hands against Weston and Cascade.

II-G. The Subleases of the Mining Claims of the Defendants and Cross-Claimant Associates were Terminated without Obligation on their Part for Further Payments of Rental or the Royalty or Development Notes.

115. The contract documents set out in the Confidential Memorandum and the Joint Venture Agreement were contracts of adhesion, each of which became a part of the offering, all of which were implicated in the relationships, rights and obligations of the parties, and all of which should be interpreted and considered in pari materia. This is especially so because in all of their actions concerning the Telegraph Mine from the inception of the joint venture, Weston and Cascade represented not only themselves but also the joint venture as sublessor.

116. It may be that the venture was destined to fail from the beginning by reason of its complicated structure, its expansive design for tax benefits as well as operating profits, a kind of dichotomy between the interests and powers of the investors and their control for this and other purposes and the centralized services of the operation manager; the conflicts of interest and commingling of interests that had been accepted and approved, the market's failure to sustain the price of gold upon which expectations of the investors were importantly based, the lack of provision for adequate financing of production in its early stages in order to sustain and expand that production until the projection of profits from production better could be realized, and other circumstances not directly related to the intrinsic value of the claims as a mine property or the mis-representations claimed to have been made. But these involved errors of judgment shared by all of the parties in varying degrees and

not fraud. The property does contain extensive deposits of ore that under a different organization, contract, management, royalty, cost or financing structure might have been operated at a profit from the gold and silver produced therefrom during the participation of the Defendant Associates. But in the context of the subsequent developments that have been reviewed above, and in light of principles of equity and good conscience which neither Cascade nor any of the other joint venturers represented by it can question, the very premise and purpose of the contracts, and particularly of the subleases, became impossible to achieve as far as the party Associates were concerned because of Cascade's program for compelled and unjustified subsidization of continued operations at a loss, when use for convenience of the term "party Associates"2 in this and similar connections hereafter is intended to be synonymous with the term "defendant and Gold Technic Associates" used elsewhere and does not include unit owners who are Weston controlled companies. it had become obvious to Weston, Cascade and to the joint venture that no 'minable and merchantable ore'could be produced without financing of early production costs beyond the profits therefrom and the obligations the Associates had contracted and assumed in connection with the purchase of their sublease interests. More particularly Cascade entered into a program of misrepresenting to the Associates its knowledge of this lack of

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2 Use for convenience of the term "party Associates" in this and similar connections hereafter is intended to be synonymous withthe term "defendant and Gold Technic Associates" used elsewhere and does not include unit owners who are Weston controlled companies.

immediate profitability in order to induce or compel the Associates to finance its continued operations without reference thereto, under the guise of a claimed legal obligation on the part of the Associates, continued its unjustifiable demands, brought a wholly unwarranted suit against the party Associates in an attempt to enforce them, terminated the lease interests of the party Associates because of their failure to comply with its unjustified demands, and thus defeated any prospect for working out the problems of financing amicably among the party Associates and the other interests involved to the extent then essential to permit their participation in the production of minable and merchantable gold and silver. In its representation and conduct as Joint Operating Manager for the Associates, including necessarily its inextricable involvement as agent for the joint venture, Cascade occupied a fiduciary position under which it owed utmost good faith and essential candor to the Associates. The burden of proof and presumptions between the parties in such relationship are quite different than they were with respect to any issues of fraudulent or even negligent misrepresentation when the parties were dealing at arms length. The party Associates have sustained their burden of proof to establish that Cascade breached its fiduciary duty toward them in respect to the frustration of the prospect of minability and merchantability of the gold and silver at the Telegraph Mine so far as their interests were and are concerned by its contrived termination of their sublease interests and its antecedents as here in found.

117. Even with the benefit of hindsight, mining people demonstrated at the trial such variant opinions and judgments as to renew and reinforce the experiences of history of which the Court can take judicial notice that mining ventures even when all of those concerned are proceeding in good faith frequently involve unanticipated failures as

well as surprising successes, and that practical development work and actual mining operations teach more surely than theoretical predictions or projections, however reasonable they may have first appeared. Weston following the sale of the subleases undoubtedly acquired extensive information concerning prospects at the mine considerably beyond that which had been provided in the Tomo Ito and Owens reports. He enjoyed from intimate and practical observation a preferred position to reevaluate the practicality of producing minable and merchantable gold and silver from the underground operations and its timing within the structure that had been established and the extent of profits, if any, that might be realized from surface heap leaching. Obviously, at some point Weston had concluded that continued production would depend not upon the profit to be immediately generated therefrom but upon subsidizing by the Associates of the costs of further development and production through "assessments" he at first had hoped would be voluntarily made by them upon their expectation of reimbursement out of production but which he at length considered it necessary to assert as their legal obligation under the Joint Operating Agreement in order to afford any possibility of continuing to operate the mine. In spite of the additional subsidization that Weston and Cascade had arranged on their own credit or that of the joint venture and the additional funds they had induced some of the Associates to contribute beyond their responsibility, Cascade simply could not immediately produce 'minable and merchantable gold and silver." By November 1982, demands for the payment of further assessments not being complied with, Cascade had in effect suspended mining operations and reported to the Associates that the property was, and would continue to be, on a maintenance basis until the Associates complied with its demand for the payment of continuing assessments, virtually holding valuable minerals

Weston claimed to be on the leach pad as hostage for his unjustifiable demands. From that point Cascade's efforts turned from managing the mine within the intendments of the agreement with realistic hope of producing the expense of operation at a profit, to a program simply to compel the Associates to make unwarranted contributions for an indefinite period of time for which they were not bound.

118. Each sublease provided that it would continue in duration "until all minable and merchantable gold and silver has been recovered by Sublessee from the mining claims. "Minable and merchantable gold and silver for the purpose of the sublease and the related contract documents was stated to "mean the gold and silver contained on and under the Mining Claims which, at the time it is reasonably reached in a proper plan of mining and development, can ordinarily be economically mined and marketed by the use of the then modern and efficient equipment, method and adequate management, at a profit by Sublessee." In view of their cutting off the interests of the party Associates as aforesaid and as hereinafter further found, Cascade and the interests it and Weston represented are hardly in a position to say that they did not pursue "a proper plan of mining and development" or did not endeavor to economically mine and market the gold and silver by the use of then modern and efficient equipment methods and adequate management and they cannot deny that the mining was not at a profit to the party Associates and never can be in view of developments following the subleasing and particularly the unwarranted conduct of Cascade. In view of these circumstances the term 'minable and merchantable gold and silver" will be construed liberally in such light in favor of the party Associates against whom Cascade and the joint venture are seeking to enforce claimed liabilities for payment of the royalty and development notes, as well as the "assessments." In equity and good conscience the subleases should

be deemed to have expired as far as the party Associates are continuing liability on the part of the party Associates to make rental and development note payments that have not already been made in cash.

119. A similar result is reached upon the basis of Cascade's own action in subsequently "terminating" the subleases of the Associates who are parties to this suit. On February 3, 1983, on stationery of the "Telegraph Joint Venture" the Telegraph Mine Joint Venture by W. David Weston for the Executive Committee, addressed a letter to each of the party Associates and giving notice of the termination of the subleases, reciting that the Associates appeared to "totally disregard the good-will efforts of the joint venture to assist you in securing a pro-rata recovery of the reported $1,800,000.00 plus value of the precious metals presently under leach" and demanding satisfaction of alleged individual obligation for payment of the "1980 recourse note $44,285.00; 1981 recourse note $44,285.00; development loan $22,857.15." But the specification of defaults went beyond these items and included failure to pay pro rata share of costs incident to "prospecting, engineering, surveying, development and mining of the property" (reciting that production from the property commenced in March of 1982) amounting to $15,419.62. It was stated that "liens have been or are being filed against the property for this amount by the Operating Manager/Contractor in behalf of itself, its sub-contractors and suppliers; failure to pay the sublessor for its services in crushing and hauling ore 'mined in your behalf at the property, in the sum of $6,564.51'; failure to pay during the calendar year 1982 payments on the prior royalty notes at the rate of $13.44 per ton of ore mined, to be paid quarterly until fully paid, all of which payments ... are in arrears amounting to $9,580.17; failure to pay pro rata share of taxes which are in arrears and for which liens have been filed against the property in the sum of $325.00."

I find this notice manipulative and especially egregious in some of its aspects. For example, the claimed tax liens and Cascade's threat of filing a lien on behalf of itself and its subcontractors and suppliers as establishing the Associates' default for permitting a tax lien and other liens to accrue against the property were ironical, even bizarre, in light of the great value of the gold Cascade said was on the leaching pad and Cascade's own duty to use reasonable effort to realize that value to meet any financial obligations of the Associates and for their profit.

120. On or about March 3, 1983, Weston for Cascade and as managing agent of the Telegraph Mine Joint Venture, gave 'notice of forfeiture termination of lease' as of February 3, 1983, to 'Telegraph Mine Sublessees (Associates)." The notice was spread upon the public records of San Bernardino County, California. This termination was unconditional and, however contrived its reasons were, had the effect under the circumstances to confirm the fact that in equity and good conscience the subleases of the party defendants had come to an end, together with any obligations to make payments of their royalty and development notes.

121. The 'Telegraph Mining Associates' Working Interest Agreement and Sublease" was signed separately by each investor. The Sublessor was Cascade "as the managing agent of the Telegraph Mine Joint Venture." All subleases were signed for the Telegraph Mine Joint Venture by 'agent and manager" Weston who was noted as "President (hereunto duly authorized)." The evidence leaves no room for doubt that Weston had full authority by virtue of governing contracts over both the existence and the termination of the party defendants' subleases, subject to termination by their own terms or as matters of law and equity. The Working Interest Agreement and Sublease provides in part as follows:

> 20. Repossession of the Premises. Except as may be otherwise provided for herein, if default be made by Sublessee in the payment of the Royalty or in the performance of any other terms or conditions hereof required to be kept and performed by Sublessee and such default shall continue for a period of one month after written notification thereof to Sublessee, then, in such event, and as often as the same occurs, Sublessor may, at its option, terminate this Sublease and reenter upon and take possession of the Sublessee's interest in the leased gold, silver and other minerals and leased premises and every Part thereof, and be reinstated in its possession to hold as if this Sublease had not been made. Such action by Sublessor shall constitute the Sublessor's sole remedy in the event of default in payment of the rent and shall result in the forfeit of its right to rent due or accrued up to the time of such termination and reentry.

Cascade and the joint venture contend that the forfeiture of their right to rent due or accrued up to the time of such termination did not include the forfeiture of payments by royalty notes already given at the time nor the payment of development notes by the party Associates. Irrespective of whether the last quoted provisions of the agreement technically can be construed favorably to the non-drafters to bar recovery on the royalty notes already delivered, for reasons heretofore stated, I hold that under the doctrine of unclean hands which is a pervasive one and can be applied by a court of equity under appropriate circumstances on its own motion in the public and judicial interests as well as that of aggrieved parties, Cascade and the joint venture should be barred from any remedy against the party Associates for the collection of the royalty notes or development notes ex-

ecuted by them. It may be observed without ascribing determinative force to the provision standing alone and out of the context of the party Associates' situation, that the last quoted provision not only would forfeit "right to rent due or accrued" but provides also that the action of termination shall constitute the sublessors' "sole remedy in the event of defau1t." While the paragraph preceding the one quoted reserves to sub-lessor other remedies available under the laws of the State of California for violation of any covenant or condition, there is added thereto "except as may be otherwise provided herein." It was so otherwise provided. If there were perceived to be any ambiguity in this respect it would have to be resolved against the sublessor since the sublessee had no hand in the drafting of the documents which were the product of Weston and those interested in the joint venture.

122. In any event, it is reasonable and proper under the circumstances to bar Cascade, the joint venture and affiliated interests from recovery against the party Associates of unpaid rental or royalty under the subleases, whether represented by royalty notes or not, and from recovery on the development note. All party Associates are free from any liability for unpaid "assessments," and the Court will consider in the accounting the extent, if any, that assessments already paid should be refunded or applied to expenses incurred by Cascade in connection with its management of the mine with the Associates' committee. Since all of the contract documents set out in the Confidential Memorandum, together with the Joint Venture Agreement, were contracts of adhesion in view of the interlocking agencies, the termination of royalty and development note obligations of the party Associates as to one should have effect of terminating the obligations of the Associates under all, without prejudice to the Montis and Weston in which equities among those parties will be considered.

IV. EQUITABLE REMEDIES AND FURTHER PROCEEDINGS FOR AN ACCOUNTING AND RELATED RELIEF

123. Cascade and Weston were reasonably obligated to render a fair, understandable and reasonable accounting of all funds received, expended or disbursed for or on behalf of the Associates and the Joint Venture. This Cascade and Weston have failed to do for various reasons, including the complexity of the accounts, the confusion of channeling funds through various corporations under the control of Weston, the allocation of funds among accounts as Weston or his bookkeeper Griffiths under his direction may have determined, the crediting, charging and allocation of funds on the theory of the "assessability" of the Associates' interests beyond profits from production, the unqualified claims for liability of the Associates for funds borrowed or contributed by Weston, Cascade or the joint venture for expenses at the mine beyond the development fund and production profits, and other misconceptions and uncertainties concerning the contractual rights and obligations of the Associates. The investors had been fairly advised from the beginning of possible conflicts of interest of Weston's interlocking ownership and activities and were on notice that there would be the interchange of funds among the various entities involved in the ownership, financing and operation of the mine and related entities; this did not obviate the necessity-of full and proper accounting. Cascade as operating manager expressly agreed that it would maintain separate accounts for the operation of the mine and the Associates' interest therein. Even though it were to be assumed that this did not require the establishment of separate bank accounts, and that Weston's general system of Tandy Corp computerized accounting could have been adaptable for the purpose, its actual utilization as thus far

demonstrated at the trial fell far short of reasonable requirements. An accounting has not yet been made in such form and substance as to be suitable for the final accounting of a fiduciary, or the necessity for which was obviated by the monitoring of committees representing the Associates, some of whose members also may have been in conflict of interest positions because of their relationship to the joint venture.

124. Weston generally was able to support his accounting system and to justify its operation on specific points on cross-examination when allowed time for checking and research, but it simply was not possible upon the basis of the present record and in the absence of a resolution of other issues in advance to come to any final judgment on Weston's prior accounting except that it is inadequate and must be supplemented and clarified hereafter. The fact that accounting exhibits adduced by the defendants and counterclaimants toward the end of Weston's testimony as somewhat haphazardly compared to some of Weston's accounting results, permitted a plausible though not convincing argument by the attorney for the Gold Technics Defendants that there were insufficiently explained items totaling as much as $800,000.00, could indicate a degree of unwarranted suspicion or a profligacy of contention concerning the nature of Weston's accounting, but it does point up the necessity of further proceedings for an accounting so that the Court can more confidently strike knowledgeable and proper balances based upon the, determinations already made.

125. While I have determined that recovery may not be had against the party Associates on the royalty and development notes and that the funds expended by Cascade and associated interests beyond the $800,000.00 development fund and interest cannot be charged against the party Associates in the accounting, there was not explored at the

trial how such expenditures and funds, or the loans to provide them, should be treated as among the members of the joint venture, which problems are reserved for the accounting.

126. The party Associates contend that Gnolaum Trust, Interphase and Telegraph Mine Limited, Cascade and Weston are the alter egos of each other and that it is necessary in order to prevent fraud or overreaching to disregard the corporate or separate existence between and among them. The foundations for such claim were not fully explored at the trial, particularly with reference to any meaningful separation of corporate entities and structures, although it is clear that Weston controls them all and has utilized others of them as instrumentalities in his projects. Whether it is necessary to disregard any separate corporate existence to preclude fraud or overreching or in the interest of justice can best be determined in connection with the final accounting proceedings. The alter ego issue is therefore reserved for such determination.

127. Cascade's and Weston's assertion of the right to "assess" the Associates beyond their rightful obligations for improper purposes and their initiation of this litigation upon that basis having been determined to be unjustified, willful and in bad faith, the Court will make an award of costs and reason-able attorneys' fees to be determined in amount and allocation in connection with the later accounting proceedings.

V. FAILURE OF PROOF ON OTHER ISSUES

128. Except by the foregoing findings otherwise indicated, the issues of fact raised in the pleadings or reserved in the retrial order are determined against the party or parties having the burden of proof with respect to them, the Court hereby finding that the evidence in support of them

is insufficient.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of the action and over the person of each party. Venue is proper.

2. The investment offerings and contracts in question in this case were not securities within the meaning of the Federal, Securities Act of 1933 (15 U.S.C. S 77a-77aa), the Federal Securities and Exchange Act of 1934 (15 U.S.C. S 78a-78hh), or the California Securities Laws (California Corporation Code SS 25,000-25,705), or at all, and their sale to the Associates was not the sale of a security.

3. The contracts involved in or relating to the sale, including the Joint Venture Agreement, were contracts of adhesion to be considered and interpreted in pari materia.

4. None of the parties was guilty of actionable fraud, deceit, misrepresentation, concealment or intentional wrongdoing in the sales of the offering to the Associates, and all proceeded in good faith in reliance upon the reports of the geologists forming a part of the Confidential Memorandum, any omissions, inaccuracies or errors in the Confidential Memorandum being made without intention or scienter or not being material and relied upon by the purchasers.

5. All of the parties entered into the transaction for the purposes of making a profit, with realistic recognition of risks but with a reasonable expectation of profit from their respective investments and there was at the time and under the circumstances then existing a reasonable basis for that expectancy.

6. The September 1980 agreement whereby Rex Mon-

tis acquired thirty-percent interest in the Telegraph Joint Venture in consideration of 480,000 shares of Rex Montis stock was not validly rescinded by the Gold Technics Defendants and the parties should continue to account to each other on the basis of any unpaid purchase price owing by Gold Technics for the original purchase price of its interest and the ownership by Gold Technics of 480,000 shares of Rex Montis stock, which should be deemed held by Rex Montis in trust for Gold Technics and ordered transferred to it

7. The interests of the Associates in the sublease and claim were not assessable and Cascade wilfully and wrongfully maintained that they were.

8. This action, in view of its convoluted nature and the counterclaims and cross-counterclaims, is essentially one in equity calling for the application of equitable principles. Accordingly, the subleases of the party Associates should be deemed expired and terminated, and the party Associates relieved of all liability for unpaid rentals or royalties in consideration thereof, and development costs, whether or not represented by notes heretofore delivered. They are not entitled to return or credit for advance royalty payments already made in cash.

9. No party.is entitled to judgment for alleged defamation, libel, slander or tortious interference with economic advantages or contracts, this Court concluding that any statements that may otherwise have been defamatory were privileged and excusable.

10. The defendants and cross-claimants are entitled to an accounting from the other parties to this action for monies, property, funds or credits coming into their possession and justly belonging to the Defendant Associates and Gold Technics claimants, upon further consideration of quantum meruit and contribution claims with respect to the latter. The respective parties are entitled to judgment for

balances found to be due in accordance with the findings and declarations of the Court and upon such accounting. The Court hereby expressly reserves jurisdiction to require and conduct such accounting, and to enter suitable orders in implementation thereof, including a determination of the extent, if any, to which it would be proper to disregard the separate corporate existence of the so-called Weston corporations to effectuate such accounting and to avoid overreaching, fraud or other injustice under the doctrine of alter ego, and to award attorney's fees and costs.

11. Except as to relief hereinabove mentioned, the issues reserved in the pretrial order or otherwise presented to the Court should be decided against the party or parties having the burden of proof thereon for failure to sustain such burden of proof and for the insufficiency of the evidence to warrant recovery.

12. The pleadings and the pretrial order should be deemed amended to conform to the proof with respect to the relief granted by the Court.

13. Counsel in this action are hereby directed by stipulation or otherwise to jointly or severally prepare and submit to the Court promptly a proposed form or forms of judgment consistent with these amended findings of fact and conclusions of law for consideration by the Court.

14. The submission of a proposed form of judgment in accordance with the foregoing direction will not be deemed in any way to be a waiver of any position heretofore taken by the parties, but simply as an attempt on the part of counsel as officers of the Court to properly implement by judgment the Court's determination, with full reservation of any objections on the part of the parties to the substance of that judgment.

Dated this 3rd day of April, 1985.

A Sherman Christensen,
Senior United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

INTERLOCUTORY JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION IN
CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff ,

v.

JEFFERY G. BANKS, et al,

Defendants

AND RELATED ACTIONS.

HON. A. SHERMAN CHRISTENSEN

The above-entitled matter having come before the Honorable A. Sherman Christensen for trial beginning October 9, 1984, and having continued from day to day, with brief recesses, to and including October 31, 1984; the Court having considered the evidence, the arguments of counsel, documents and pertinent contracts, and having been fully advised in the premises;

JUDGMENT IS HEREBY ENTERED AS FOLLOWS:

1. This Court has jurisdiction over the subject matter of the action and over the person of each party; and venue is proper.

2. The investment offerings and contracts in question in this case are not securities within the meaning of the Federal Securities Act of 1933 (15 U.S.C. SS77a through 77aa), the Federal Securities and Exchange Act of 1934 (15 U.S.C. SS78a through 78hh), or the California Securities Law (California Corporations Code, SS25,000 through 25,705), or otherwise.

3. The sale to the associates, the Joint Operating Agreements, the Working Interest And Sublease Agree-

ments, the Recourse Royalty Notes and the Security Agreements do not constitute a sale of securities under the Federal and California State Securities Law .

4. The Joint Operating Agreements, the Working Interest and Sublease Agreements, the Recourse Royalty Notes and the Security Agreements were contracts of adhesion and must be considered and interpreted in pari materia.

5. The Sublease and Working Interest Agreements, Joint Operating Agreements, Recourse Royalty Notes, Security Agreements, and all other written or oral agreements to which the associates were parties, are expired and terminated; and the party associates are relieved from all liability for unpaid rentals, royalties, loans, or other liabilities under such agreements in consideration thereof. The party associates are not entitled to return or credit for advance royalty payments already made in cash, except as may be indicated by the accounting.

6. The interests of the Associate Parties in the Sublease and Working Interest Agreements, Joint Operating Agreements, Recourse Royalty Notes, and Security Agreements are not and were not assessable. Weston, individually and by and through his office as President of Cascade, willfully, wrongfully, in bad faith and in breach of his fiduciary duties, maintained that the associates' interests in such agreements were assessable.

7. The party associates are hereby awarded their attorneys' fees, costs and expenses against Cascade and Weston in defending this action, in an amount to be determined at the time of the accounting.

8. No party herein made any unjustified or unprivileged defamatory statement, or interfered with any contractual relationship or prospective business advantage of any other party.

9. The September, 1980, agreement whereby Rex

Montis acquired thirty-percent interest in the Telegraph Joint Venture in consideration of 480,000 shares of Rex Montis stock was not validly rescinded by the Gold Technics defendants; and the parties are ordered to continue to account to each other on the basis of any unpaid purchase price owing by Gold Technics for the original purchase price of its interest; and the ownership by Gold Technics of 480,000 shares of Rex Montis stock is deemed held by Rex Montis in trust for Gold Technics and is ordered transferred to it.

10. The defendants and cross-claimants are entitled to an accounting from the other parties to this action for monies, property, funds or credits coming into their possession and justly belonging to the Defendant Associated and Gold Technics claimants, and said accounting is hereby ordered. The respective parties are entitled to judgment for balances found to be due in accordance with the findings and declarations of the Court and upon such accounting. The Court hereby expressly reserves jurisdiction to require and conduct such accounting, and to enter suitable orders in implementation thereof, including a determination of the extent, if any, to which it would be proper to disregard the separate corporate existence of the so-called Weston corporations to effect such accounting and to avoid overreaching, fraud or other injustice under the doctrine of alter ego, and to award attorney's fees and costs.

11. This Interlocutory Judgment shall not be final or appealable unless and until the Court certifies one or more of the issues herein for an interim appeal; and in such event, only those issues so certified shall be appealable.

12. The submission or approval of the form and content of this Interlocutory Judgment shall not be deemed in any way to be a waiver of any rights the parties may have to object or move to amend or supplement the Findings of Fact and Conclusions of Lawor the Interlocutory Judgment

herein, and such parties shall have full reservation of such rights.

DATED this day of , 1985.

BY THE COURT:
HON. A. SHERMAN CHISTENSEN
U.S. District Court Judge

90-81

No. . . . .

FILED
JUN 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPELLANT APPENDIX "A - 3" DISTRICT COURT ACCOUNTING FINDINGS AND FINAL JUDGMENT

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BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ACCOUNTING AND RELATED PHASES OF CASE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION IN CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION, a Nevada corporation,

Plaintiff,

v.

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY-AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

CHRISTENSEN, J.

The Amended Interlocutory Findings of Fact and Conclusions of Law on the trial proper were filed on April 3, 1985, and based thereon an Interlocutory Judgment was filed on April 15, 1985. Reserved for further determination by the Court were the issues of the accounting ordered to be rendered herein; the damages or sums, if any, to be recovered by any party; the amount of attorney's fees to be awarded the Defendant Associates by virtue of the bad faith in bringing the principal complaint by plaintiff Cascade

Energy and Metals Corporation (Cascade), W. David Weston (Weston) and/or other related entities; whether the facts and circumstances of the case require, in the interests of justice, that the separate corporate-or formal legal entities of plaintiff Cascade, and the cross-defendants and counter-defendants Rex Montis Silver Company (Rex Montis), Telegraph Mine Limited, Weston, and Gnolaum Unitrust be disregarded and each held liable for the debts ;and liability of the others under the final judgment to be rendered herein, and terminal findings and conclusions to further complete the basis for a final judgment in this litigation.

On August 5, 1985, this action came on for hearing of the issues reserved by the Interlocutory Judgment. Evidence was presented on August 5, 6 and 7, 1985, and on August 7, 1985, the matter was argued and submitted for decision.

Now deeming itself to be fully advised, the Court makes and enters the following:

FINDINGS OF FACT ON RESERVED ISSUES

1. All findings of fact set forth in the Amended Interlocutory Findings of Fact and Conclusions of Law filed April 3, 1985, are hereby adopted and confirmed by the Court as part of its final disposition, as supplemented and amended by the present findings and conclusions which to the extent, if any, inconsistent with the original amended findings shall be deemed controlling.

2. Counsel for the Defendant Associates have submitted proof by affidavit of the time devoted to the defense of plain-tiff's claims. The Court has observed the nature and extent of the services of counsel in the various phases of the litigation, and in the light of the proof is in a position to form a reasonable judgment concerning the legal services properly assignable to the defense of the meritless and bad-faith

claims against the Associates. It has no reason to question the total billings, rates of billings and reasonableness of billings submitted by counsel but yet believes it should take into consideration also in any allocations the time and efforts devoted to other matters to the extent not considered by counsel in their own computations and time unreasonably devoted to efforts to sustain unwarranted positions. In consideration of such matters, weighed in the light of time spent, reasonable rates of compensation for time spent, the nature of the responsibilities involved, and all other considerations having bearing upon the reasonableness of the award of attorney's fees under the circumstances, the Court has determined that reasonable awards to be made for attorney's fees are as hereinafter provided.

3. The defendants Waugh, Moses, Harmatz and Hodowski are limited partners in Gold Technics, Ltd. and are also Associates. These defendants were required to defend themselves against the main action brought and maintained in bad faith by Cascade and Weston, and they reasonably incurred attorney's fees, costs and expenses attributable to that defense in the amount of $25,000.00.

4. The other Defendant Associates have incurred attorney's fees, costs and expenses of $240,000.00 reasonably attributable to the defense of the action brought in bad faith by Weston and Cascade.

5. Cascade is the general partner of Telegraph Mine Limited, a member of the Telegraph Joint Venture, and the operating manager of the Telegraph Joint Venture and Telegraph Mining Associates. Cascade owed to them a fiduciary duty of fairness, full and complete disclosure, and an honest accountability as to funds, equipment and monies of the Telegraph Mine Joint Venture and funds held in trust and expended by it with respect to the $800,000.00 development loan.

6. Rex Montis is a member of the Telegraph Joint

Venture, is the general partner of Gold Technics, Ltd., and owed a fiduciary duty to them of fairness, full and complete disclosure and honest accountability as to assets and money of the joint venture and the partnership, and the duty to avoid taking any improper actions injurious or detrimental to the interests of the joint venture, the partnership or to its limited partners.

7. Weston, as a controlling shareholder, director and officer of Cascade, Rex Montis, Interphase, Telegraph Mine Limited and the Gnolaum Unitrust, is the alter ego of those entities, as they have been and are of him, and owed a fiduciary duty to the Telegraph Joint Venture, the Telegraph Mine Associates, and Gold Technics, Ltd. for a full and complete accounting of money and assets which came within his possession or control, and in the handling, allocation, and accounting for funds, Weston exercised full direction, supervision and control.

8. In keeping accounts for the purposes of the organizations and entities of which he was in control, or purported to be acting for, Weston involved the services of Calvin Griffiths, audited in part by Joel Harrison, C.P.A., and reviewed generally in preparing for the accounting hearing but not audited by J. Brent Kartchner, C.P.A. With respect to allocations to particular accounts or characterizations of transactions in his final accounting report to the Court, Weston exercised control and apparently did most of the meaningful work himself. Weston claimed that Hodowski and Stoltenberg reviewed a part of the accounting records in connection with their services for the Associates' Management Committees and thus 'accepted' them. The Court finds in this connection that there was no acceptance of any of the Weston records as sufficient for the purposes of a final fiduciary accounting and that any acquiescence in them by the parties directly or through the Management Committees was upon only hasty and fragmentary study in

light of the extent and complexity of those records and was further complicated by Weston's manipulations and failures of disclosures, and did not operate in any sense as an estoppel or bar to the right of opposing parties to a full, true, and correct fiduciary accounting in these proceedings. The Court further finds that examinations of a portion of those records by certified public accountants and their reports concerning them did not persuasively support the accuracy of matters hereinafter determined not to have been sufficiently accounted for since the depended largely upon allocations and directions arbitrarily and improperly made by Weston, often without documentation, rather than the facial sufficiency of the accounting system employed and the 'balancing' of entries in connection with that system.

9. Interphase Corporation was employed to maintain the accounting records under Weston's direction and supervision during the operative period. The records were kept in a double entry system of accounting where each accounting entry generally was balanced in the accounting equation so that the asset accounts as posted equaled the liabilities and ownership equities accounts; each transaction was electronically posted utilizing a Tandy Corporation computer software accounting package. The accounting transactions in most instances were journalized chronologically by the computerized system of accounting which automatically collected the journal entries into the system of ledger accounts, subject to reallocation or different treatment as Weston might later direct. Supporting invoices, checks and other documents were cross-referenced to the subsidiary ledgers in a manner which usually provided for access and identification, hut characterizations, allocations or reallocations frequently were undocumented and depended upon the oral direction of Mr. Weston. Extensive transactions over the course of years and involving the businesses of the Associates, the joint venture, Telegraph Mine Limited, In-

terphase, the Gnolaum Trust, as well as Cascade, were for the most part handled through a single bank account of commingled funds. It was and is impossible to trace individual dollars from source to use.

10. The accounts and accounting involved here are so voluminous, convoluted and complex as likely to have required months of work by accounting experts and the expenditure of unacceptable sums of money to fully evaluate and determine the accuracy of the accounting submitted herein, if this could ever be accomplished. In an effort to concentrate upon items that might be most questionable, the parties stipulated that Weston would submit in advance of the accounting hearing a written accounting according to his claim of an adequate fiduciary accounting and that opposing parties would submit a statement of their questions and concerns, to be followed by Weston's responses thereto, item by item. The Gold Technics Defendants have argued that Weston's entire system of accounting is inadequate as a fiduciary accounting. However, the approach upon which the parties have at least tacitly agreed, the proposed findings submitted by the parties concerning the accounting, and the practicalities of the situation in view of the record before me, have led me to find that the system utilized is not in general suspect so as to authorize its rejection as any basis for a fiduciary accounting, and to find that the day by day records of operations and their accounting are substantially accurate except for those items, areas or matters as to which I make specific findings to the contrary herein or which relate to those findings. On the other hand, I have considered the uncertainties and defects with respect to the accounting otherwise and have reached the considered judgment that there are no credits or other items in other areas of the accounting which negate or reduce the balances found due to the Associates and the Gold Technics Defendants from a consideration of the specific items which they

have questioned, and I so find.

11. Prior to December 31, 1982, the Defendant Associates actually paid 'assessments' to Weston and Cascade for which they were not obligated as follows:

Herbert W. Stoltenberg	3,400.00
Jeffery G. Banks	1,000.00
Roger A. Mann	2,000.00
David G. Henry	4,200.00
Delford Ashley	20,421.12
George and Patricia Slater	2,307.75
Robert Doub	9,231.00
Sam and Alyce Hambarian	9,258.31
Peter P. Samarin	5,000.00
Lionel Ascher	4,615.50
Harmatz & Hodowski	4,500.00
Chris Waugh	4,516.00
	$70,449.68

12. The Court has already found the assessments were not due, and were collected in bad faith by Weston and Cascade. Accordingly, judgment with interest from December 31, 1982, at the rate of 10% per annum should be entered in favor of the respective payers. No deductions should be made for expenses allegedly incurred by Cascade on the strength of Management Committee directives for the reasons hereinafter indicated.

13. Cascade did not incur any additional significant expenses because of the Associates' Management Committee directives which would not have been incurred in their absence. In fact, the Committee likely reduced expenses to the benefit of Cascade itself, in view of the absence of any persuasive showing that the mine could have been profitably operated in any event. Moreover, the intervention of the Management Committee itself was induced and justified by

violations of the fiduciary duties of Weston and Cascade and their lack of candor and good faith as before found.

14. The fiduciary accounting prepared by Weston and Cascade attributing $159,776.13, including all of the operating expenses of the mine for the months of October, November and December of 1982, to the Management Committee and the Associates, was not prepared and submitted in good faith and sought to enlarge an improperly induced and limited assumption of extra expense into a carte blanche assumption of all-inclusive expense. The Management Committee Resolution provided "It is expressly agreed that any costs incurred by the Operating Manager in complying with any special requests of the Management Committee shall be born [sic] proportionally by the Associates." On November 12, 1982, Weston wrote to the Committee (Exhibit 118), quoting this wording and enclosing a "current billing in the amount of $3,186.50" in accordance with the resolution. No other or further charge was made for or attributed to 'special requests' prior to this litigation.

15. Having been relieved from payment of their development loan notes, the Defendant Associates are not interested in, nor have they sought, an accounting of the expenditure of the development fund. Hence, the Court has not further considered as to them the sufficiency or insufficiency of the fiduciary accounting concerning the expenditure of the development fund, However, the Court has not been able to avoid the clear implication of a related consideration arising from the bad-faith claim asserted in the fiduciary accounting as last mentioned and in the testimony of Weston at the accounting hearing with respect thereto.

16. Weston testified in attempted justification of his accounting and particularly his 'assessments' following the appointment of the last Management Committee that they were made in sole reliance upon the Associates' contract

through that committee, not by virtue of any obligation of the Associates under the terms of the Joint Operating Agreement. The limited written undertaking of the Management Committee has already been noted and the Court is aware that during the initial trial Weston asserted that members of the Management Committee had undertaken to assist in collecting the assessments which Weston claimed were being levied by virtue of the terms of the Joint Operating Agreement. The adroit manner in which Weston in the last stage of the litigation seized upon and distorted these circumstances to avoid the impact of my ruling that there was no such right of assessment was impressive. By thus putting aside his formerly intransigent position that his 'assessments' were levied on the basis of the terms of the Operating Agreement, and disregarding the pleading, pretrial order and testimonial record up to the time of his purported final accounting with a semblance of plausibility, he rendered it increasingly manifest to the Court that here was an able person who would be especially persuasive to business associates trying to monitor their investments from a distance and hopeful for profits from their association, but without benefit of the full adversarial presentation that has been available to the Court.

17. This perception has thrown additional light upon the matter of the development loan so importantly involved in the accounting in light of the other circumstances of the case, and upon the timing of Weston's realization that his production projections and the feasibility of his plan for developing the mine were fallacious. My interlocutory findings determined that obviously at some point Weston had concluded that production would depend not upon profits to be immediately generated from the property but upon subsidizing the cost of further development and production through his "assessments." His letter of July 28, 1981, to the Associates recommending diversion of

development funds "to surface mining and heap leaching of the surface ores, and that the early profits "scalped" from this operation be used to suppliment [sic] the pre-development loan funds to assure the continuing full development of the shaft and underground mining operations," marked that point. It bears clear indication, in light of developing circumstances, not only of a realization that underground mining at a profit would be impossible from expenditure of the development loan and interest, but that as early as July 1981 he was laying the foundation for his later explicated theory that the "development loan fund" was actually not intended by the parties as such but only as 'pre-development loan fund,' with the Associates being required to provide through assessments whatever additional funds were necessary for development or "pre-production" expenses.

18. Adhering to my interlocutory findings concerning the good faith of Weston in connection with the original offering in reliance upon the existing reports of geologists and his analysis of and projections from them as to underground operations, I am now clearly convinced that Weston's bad-faith conduct had its inception on or prior to the writing of July 28, 1981, and that a breach of Cascade's implied covenant of fair and honest dealing as a fiduciary toward the Associates continued from that time to and including the institution of the present action as described more particularly in my interlocutory findings.

19. The Gold Technics Defendants having amply sustained their burden of proving their right to an accounting, Cascade, Rex Montis and Weston had the burden of proving the validity and accuracy of their fiduciary accountings particularly with respect to the items or areas reasonably questioned by the opposing parties. Whether, and to the extent, if any, they have met this burden must be determined not only upon the basis of the financial statements, declarations, invoices, documents, printouts, ledgers, journals, and other

formal or facial matters submitted or covered by the evidence, but in the light of all surrounding facts and circumstances under which the accounting and financial data were entered, prepared or modified, including the facts that the December 31, 1982, financial statements for the various entities were prepared only after an adversary relationship developed and the filing of this and other civil suits; the fiduciary accounts recently submitted vary in significant respects from the prior annual, "audited" and interim financial statements prepared by Cascade and Weston; Cascade's practice of commingling fiduciary funds with its own funds in a general account which made it impossible in many instances to trace money from its source to its ultimate use; Cascade's practice of freely transferring funds to itself or related entities "on account," and then "accounting" for these funds as an account payable by Cascade, with a corresponding account receivable from the entity whose funds were transferred, rendering it difficult as to any particular item to determine whether the transfer was for a legitimate use of fiduciary funds or some other purpose; Cascade's practice of preparing Cascade invoices for expenditures after the transfer of funds; and serious questions concerning the credibility of Weston and particularly his propensity at a given time to rationalize his conduct and position in disregard of prior circumstances, actions and intentions as they had existed or occurred theretofore.

20. It was Cascade's practice to withdraw and deposit in Cascade's general account, fiduciary funds "on account" in large, even-numbered checks, to commingle the deposited funds with those of its own, the Telegraph Mining Associates, and the Telegraph Joint Venture, and subsequent to those deposits later attempt to account for or attribute them to undocumented pre-intentions or to invoices Cascade or Weston caused to be prepared to indicate where, how or for what purpose the monies were spent.

21. It was only after the commencement of this litigation that Cascade/Interphase/Weston prepared the December 31, 1982, financial statements. The Telegraph Joint Venture financial statements, together with the Gold Technics, Ltd, statements on that date, were not sent until August 1983. Those statements claimed, for the first time, a purported obligation to Downey Bank of $95,000.00 and to Zion's Bank of $165,000.00 by the Telegraph Joint Venture. There were no December 31, 1982, financial statements for Telegraph Mining Associates prepared or submitted at that time.

22. With respect to the conflict of interest positions of Weston and the companies under his control, Weston has sought to make the point both in his accounting and in other connections that all of the parties concerned were aware from the beginning of the convoluted nature of his control and assumed the risk. Indeed, even under the circumstances prior to the establishment of his overreaching, the spectacle of Weston's signing an agreement as officer for the managing agent of one entity with himself as managing partner or agent of another, appeared remarkable although not on its face legally infeasible. But such initially approved or accepted conflict of interest and activities when the violation of fiduciary duties has been established cannot change the law or the obligations of any party to comply with considerations of good faith, fair dealing and candor in the discharge of fiduciary duties nor alter or relax the rules and requirements for a fiduciary accounting.

23. Thus, while there are innumerable transactions to which exception has not been taken that were accomplished under conflict of interest or other circumstances presenting problems in general, others in particular on their face are highly suspect by reason of conflicts of interest, or self-serving treatment by Weston after the commencement of this litigation and in important instances even after the trial of

the primary issues had been completed and I had filed my interlocutory findings of fact, conclusions of law and judgment. To hold Weston and the companies under his control to the usual rules concerning the sufficiency of fiduciary accounting and to the consequences of substantial insufficiencies thereof with respect to specific matters to which exception has been taken and as to which inadequacies have been established is appropriate despite the wide discretion with which the parties initially invested him. These observations bear upon findings concerning applications of the alter ego doctrine to be considered later, as well as to the accounting itself as it relates to the interest of the Telegraph Mine Joint Venture and the Gold Technics Defendants which will now be considered more particularly in order.

24. Cascade has attempted to account to the joint venture for cash receipts totaling $2,100,000.00 in lease or royalty payments, together with interest income of $10,319.22, from the sale of the thirty-five Telegraph Mine leasehold interests to the Telegraph Mining Associates at $60,000.00 cash per unit. The sum of $1,841,682.30 was reportedly received by Cascade in 1981, $260,319.00 in 1982 as the result of payments in that year from Associate unit purchases. The sum of $165,000.00 was reportedly paid by Cascade and Interphase in the latter year for the purchase of 5 1/2 units of the Telegraph Mining Associates for which there were no checks or sources of funds identified for the payment; $95,319.00 represented cash received from other Associates. Receipts in 1982 did not include an additional $30,000.00 to be received by the Telegraph Joint Venture in 1982 from Resource Concepts, a Weston entity, for the purchase that year of the 'Glick' unit. Of the total amount received, $800,000.00 was loaned by the Telegraph Joint Venture to the Telegraph Mining Associates in January 1981.

21[sic]. On February 3, 1982, Cascade, on its own behalf,

obtained a $205,000.00 line of credit with Downey Bank, secured with equipment which it attributed to itself. This loan was disbursed to Cascade, for its own purposes. The June 30, 1982, financial statements of the Telegraph Joint Venture do not show the joint venture's owing any part of the Downey loan, nor any portion of a Zion's Bank loan of $245,000.00 obtained by Cascade in May or June, 1982. In correspondence with the Associates in 1982, Cascade stated that it and Weston alone had advanced sums of money to meet the expenses of the Associates' operations; there was no reference to the Telegraph Joint Venture borrowing or obtaining the loans on behalf of the Associates.

22[sic]. The Gold Technics Defendants' claim $285,363.42 as funds unaccounted for out of the $800,000.00 development loan. While the Court believes there are defects in Cascade's accounting in this respect, it finds that any inadequacy is not significant and need not he recognized in view of funds substantially in excess of the questioned expenditures from the development fund with which Weston and his associated interests to be responsible as individual advances without right of reimbursement from Gold Technics, Ltd., the Associates, or the joint venture. Nor, on the other hand, have I permitted these individual advances to reduce the amounts which I have found Weston and his affiliated interests must account to the joint venture or Gold Technics, Ltd.

23[sic]. The purported accounting rendered by Cascade and Weston and their subsequent affidavits and explanations are wholly inadequate and do not account to the Telegraph Joint Venture for the following sums:

(a) The sum of $36,943.73 claimed as cash deduction for "depreciation," which was improperly used as a deduction expense for cash received.

(b) The sum of $335,722.90 for money Cascade had transferred and used as of December 31, 1981, and has not

accounted for, or replaced, from the Telegraph Joint Venture funds, which is reflected on Cascade's books and records as liabilities to the following entities:

2105 Interphase N/P	$30,681.89
2107 Telegraph Joint Venture N/P	$305,041.01

(c) The sum of $81,308.00 for Cascade's unwarranted, unjustified transfer from Telegraph Joint Venture funds to Interphase Corporation, which was not repaid.

(d) The sum of $165,000.00 for investment in 5 1/2 Associate units, not paid.

(e) The sum of $10,500.00 which was transferred to Rex Montis and not repaid.

24[sic]. The Gold Technics' additional claim for an allegedly improper credit asserted by Weston totals $28,373.99 and is comprised of the $16,534.97 for 'offering exp. Williams' and $12,839.02 for "legal & accounting". This is questioned by the Gold Technics Defendants on the ground that the Joint Venture Management Agreement specifically provided that an additional $800.00 per unit sold in the Telegraph Mining Associates' offering (800 units x 35 = $28,000.00) was to pay for legal and accounting expenses in and prior to the offering. However, reading the Joint Venture Management Agreement in pari materia With the Joint Operating Agreement and the notes to Weston's projections, I find that the legal and accounting expense allocation out of joint venture funds was justified.

25. There has been no distribution of capital to Gold Technics, Ld. or the Gold Technics Defendants, and the attempt by Cascade, Rex Montis and Weston, as fiduciaries, to justify their failure to account for the foregoing charges on the theory of 'capital distributions' is an improper and self-serving attempt to avoid accountability for the balances they owe as above specified.

26. Based upon the foregoing, Cascade and Weston have not accounted for, paid or repaid at least $629,474.63

to the Telegraph Joint Venture after the allowance of all offsets, balancing items and justifications that are established by the record.

27. There has been a complete and irremedial breakdown in the relationship between Gold Technics, Ltd. on the one hand and Cascade, Rex Montis, Weston and his related entities on the other with respect to the joint venture. The purpose of that venture as far as the interest and participation of Gold Technics, Ltd. is concerned, has been frustrated, obstructed, and rendered impracticable and futile by the unlawful and improper conduct of the other members of the joint venture and of Weston, the joint venture thereby has been terminated de facto as far as Gold Technics, Ltd. is concerned and the latter should be relieved from further participation and responsibility with respect to the joint venture. In the absence of substantial evidence as to the amount of damages thereby caused to Gold Technics, Ltd., and by reason of the mounting indications that success of the joint venture and its value otherwise have been uncertain if not highly speculative from its relatively early stages, nominal damages in the sum of $5,000.00 only should be awarded to Gold Technics, Ltd. in this accounting.

28. Now, as to the accounting of Rex Montis directly to Gold Technics, Ltd,, the Court finds that in June, 1983, Rex Montis and Weston, as the general partner and a fiduciary to Gold Technics, Ltd., transferred and released 38,000 shares of the 480,000 shares of Rex Montis stock, which it held in trust for and never delivered to the Gold Technics, Ltd. under the September 1980 sale agreement, as collateral for the Cascade-Downey Bank loan. The bank then sold the stock and credited Cascade's loan account in the amount of $18,620.00. Cascade, Rex Montis and Weston converted the Gold Technics, Ltd. stock for the purposes Cascade's loan without right or justification.

29. Gold Technics, Ltd. purchased its initial interest in

the Telegraph Mine under an agreement dated January 24, 1979, which provided for a total purchase price of $150,000.00, payable $50,000.00 down with $100,000.00 paid in eight equal annual installments, interest at 9 3/4%, with an option to accelerate remaining amounts "... by the greater of either the annual installment or thirty percent of all amounts received by the Buyer as a result of its interest in the 1ease...."

30. Gold Technics did not receive any profit by reason of its lease interest in the Telegraph Mine. Weston testified that in May or June of 1985 he transferred the Telegraph Mine lease to a third party without notice to the Gold Technics Defendants. Gold Technics, Ltd. paid to Telegraph Mine Limited $75,000.00, plus interest, for all payments due as of January 24, 1981. By reason of the circumstances found here in, and particularly because of the breaches of fiduciary duty owing to the joint venture and to Gold Technics, Ltd. which frustrated the purposes of the joint venture as aforesaid, there has been a partial failure of consideration with respect to said obligation which in equity and good conscience should relieve Gold Technics, Ltd. from payment or accountability for the balance.

31. Cascade claims that the Associates obtaine an injunction in California litigation by which it was foreclosed from operating the Telegraph Mine for a period to its damage. The Court finds, by reason of the limited restrictions of that injunction and failure of proof, that it suffered no damage as a result thereof to offset in whole or in part the amounts awarded to the Associates or to Gold Technics, Ltd.

32. Thus, on this accounting by Rex Montis to Gold Technics, Ltd. directly there is owing to the latter the sum of $18,620.00, after credit has been allowed to Rex Montis and all other alter ego entities for whatever offsets, balancing items or 'justification are established in the record.

33. As to the other claims of the Associates and the Gold Technics Defendants in this accounting, the Court finds that they have not been sustained and that the accounting of Weston and his alter ego entities has been, if not satisfactory in general, at least materially sufficient except as to its insufficiency and ineffectiveness to explain or justify any deductions or offsets to the balances found due herein, so that upon the payment of said balances and the other awards herein a settlement shall have been accomplished among the parties, saving only rights of the Gold Technics Defendants as stockholders of Rex Montis and as partners in the limited partnership of Gold Technics, Ltd.

34. I have allowed prejudgment interest on the refund of improperly collected assessments since the entitlement thereto is clear, the accounting between the Associates and the opposing parties uncomplicated in view of any other findings, and the amounts and times of accrual are certain. Except for this inclusion, I find that it would be inequitable and improper to allow prejudgment interest on any other balances. As to them, the times of the accrual of amounts found due is difficult to determine in view of varying positions and equities. The plaintiff, Weston and associated companies have been held to the risk of various advances they made, notwithstanding prospective although illusionary benefit to the joint venture, on the hope of reimbursement from the unlawful "assessments." In a sense the Gold Technics, Ltd. as joint venturer and the other Gold Technics Defendants were represented by Weston and stood to gain from some of his conduct in that representation although they were not in pari delicto. Considering these and other circumstances, I do not find it appropriate to award prejudgment interest on balances owing to them and exercise my considered discretion in denying it.

35. Interphase, Gold Technics, Telegraph Mine, Ltd., Telegraph Mine Joint Venture, Cascade and Rex Montis are

instrumentalities of Weston which were and are used by Weston for his own personal purposes. Weston disregarded the purported separateness of the entities and commingled the funds of the entities and his own. He dominated their boards of directors and management, and has been and is able to single-handedly transfer assets from one entity to another and to and from himself as he chooses, with the acquiescence and consent of all. It would be inequitable and a fraud on the opposing parties if any judgment against Weston, Cascade, or Rex Montis were not also against these alter ego entities. Accordingly, the judgments to be awarded herein for balances due, restitution, damages and costs and attorney's fees should run not only against Cascade and Weston but against Interphase, Telegraph Mine Limited, Rex Montis and Gnolaum Unitrust. From the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law (to be deemed also Findings of Fact to the extent partaking of the nature of such).

CONCLUSIONS OF LAW

1. The interlocutory amended conclusions of law filed on April 3, 1985, along with the interlocutory amended findings of fact, are hereby confirmed and adopted for the Court's final conclusions of law as supplemented hereby,

2. The Defendant Associates, except Harmatz, Hadowski, Waugh and Moses, are entitled to judgment in their favor jointly and severally in the sum of $240,000.00 as attorney's fees, costs and expenses reasonably incurred by them in defending the bad-faith action of Weston and Cascade.

3. Defendants Harmatz, Hadowski, Waugh and Moses are entitled to judgment in their favor jointly and severally in the sum of $25,000.00 as attorney's fees, costs and expen-

ses reasonably incurred by them in defending the bad-faith action brought by Weston and Cascade against them in their capacity of Associates.

4. The following Defendant Associates are entitled to judgment in their favor for assessments theretofore paid by them to Cascade severally in the following amounts: Herbert W. Stoltenberg, $3,400.00; Jeffery G. Banks, $1,000.00; Roger A. Mann, $2,000,00; David G. Henry, $4,200.00; Delford Ashley, $20,421.12; George and Patricia Slater, $2,307.75; Robert Doub, $9,231.00; Sam and Alyce Hambarian, $9,258.31; Peter P. Samarin, $5,000.00; Lionel Archer, $4,615.50; Harmatz and Hadowski, $4,500.00; Chris Waugh, $4,516.00. These Associates are entitled to prejudgment interest on such amounts at the rate of 10% per annum from December 31, 1982, to date of judgment.

5. Cascade, Rex Montis and Weston have failed and refused to provide to the Associates and Gold Technics Defendants a full, accurate and complete accounting as fiduciaries of the $800,000.00 development fund and interest entrusted to them as fiduciaries. The Defendant Associates, however, are not entitled to a further accounting for these funds or any payment by reason thereof because of their having been relieved of the burden of repayment of the development loan making up the development fund, nor are the Gold Technics Defendants entitled to a further accounting therefor since Cascade and Weston from their own funds or funds for which they are otherwise being held to account to the Telegraph Mine Joint Venture and Gold Technics, Ltd. recompensed and thus rendered immaterial the deficiencies in the development fund claimed by the Gold Technics Defendants to be unaccounted for.

6. Rex Montis converted for its own purposes Rex Montis stock belonging to Gold Technics, Ltd. for which the latter is entitled to judgment.

7. Gold Technics, Ltd., as party in interest to the

Telegraph Mine Joint Venture is entitled to judgment on the accounting to that joint venture in the additional sum of $62,947.46, together with the further sum of $5,000.00 as nominal damages for the wrongful frustration and de facto termination of the Joint Venture.

8. Interphase, Telegraph Mine Ltd., Cascade, Rex Montis and Gnolaum Unitrust were and are instrumentalities of Weston and Cascade and used by them for their own personal purposes and as their alter egos, and judgment should run against said alter egos jointly and severally.

9. To secure payment of the judgment awarded to the Defendant Associates for attorney's fees and costs, as well as return of assessments collected with interest, the Defendant Associates should be granted a lien on the following Telegraph Mine claims effective from December 30, 1980, subject only to the rights, if any, of non-parties who have acquired adverse interests in good faith and without notice:

Claim Name	U.S.B.L.M. Registration No.
Telegraph-No. 1-10 Telegraph Mill Site No. 1 - 4	CAMC No. 86293 - 86306
Agua Dulce No. 4 - 17	CAMC No. 86307 - 86320
Gold Dyke North, Gold Dyke South C Gold Dyke No. 1 - 9	No. 86246-86256
Cascade Gold Dyke No. 10 - 21 Telegraph No. 11 - 21 No. Telegraph, No. Telegraph, Agua Dulce No. 18 - 51	CAMC No. 98683 - 98743 No. 1 - 2

Situated in Sections 16, 17, 18, 19, 20; T. 15 No., R. 11 E.; San Bernardino Meridian, San Bernardino County, Latitude 35 23' Longitude 115 50' West at corner No. 2 of

South Telegraph Lode Mining claim. (See original 'Working Interest Agreement and sublease' in the following identified records: San Bernardino Co. File No. 81-072262).

Dated this 16th day of September, 1985.

A. Sherman Christensen
Senior United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

FINAL JUDGMENT
IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION IN
CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff,

v

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

The Court having made and entered its final Findings of Fact and Conclusions of Law, in harmony therewith it is hereby ordered, adjudged and decreed:

1. The Interlocutory Judgment of the Court made and entered on April 15, 1985, is confirmed, hereby made a part of this final judgment and incorporated herein by reference, supplemented by the provisions that follow with specific reference to the resolution of the accounting and related issues reserved by the Interlocutory Judgment.

2. The Defendant Associated, except Harmatz, Hodowski, Waugh and Moses, shall have and recover judgment jointly and severally against Cascade Energy and Me-

tals Corporation, W. David Weston, Rex Montis Silver Company, Telegraph Mine Limited, Interphase Corporation, and James F. Peters, Trustee of the Gnolaum Unitrust, for the sum of $240,000.00, as attorney's fees, costs and expenses, and also for the amounts set opposite their respective names together with interest on those amounts from December 31, 1982, to the date of this Judgment at thy rate of 10% per annum, as restitution for assessments unlawfully collected from them:

Herbert W. Stoltenberg	$3,400.00
Jeffery G. Banks	1,000.00
Roger A. Mann	2000.00
David G. Henry	4,200.00
Delford Ashley	20,421.12
George and Patricia Slater	2,307.75
Robert Doub	9,231.00
Sam and Alyce Hambarian	9,258.31
Peter P. Samarin 5,000.00	
lionel Ascher	4,615.50
Harmatz & Hodowski	4,500.00
Chris Waugh 4,516.00	
	$70,449.68

3. Gold Technics, Ltd. shall have and recover judgment against Cascade Energy and Metals Corporation, W. David Weston, Rex Montis Silver Company, Telegraph Mine Limited, Interphase Corporation, and James F. Peters, Trustee of Gnolaum Unitrust for the sum of $62,947.46 as a further balance due upon this final accounting, together with nominal damages of $5,000.00 for the frustration and termination of the Telegraph Mine Joint Venture. Samuel Harmatz, Bernard Hodowski, H. E. Moses and Chris Waugh shall have and recover judgment against this for the additional sum of $25,000.00 as attorney's fees, costs and expenses as Associates in defending the bad-faith action of

Weston and Cascade.

4. To secure payment of the judgment hereby awarded to the Defendant Associates for attorney's fees and costs as well as for reimbursement of assessments, with interest, the Defendant Associates are hereby awarded a lien on the following described Telegraph Mine claims effective from December 31, 1980, subject only to the rights therein, if and, of non-parties who have acquired adverse interests in good faith and without notice.

Claim Name	U.S.B.L.M. Registration No.
Telegraph No. 1 - 10	CAMC No. 86293 - 86306
Telegraph Mill Site No. 1 - 4	
Agua Dulce No. 4 - 17	CAMC No. 86307 - 86320
Gold Dyke North, Gold Dyke South	CAMC No. 86246 - 86256
Gold Dyke No. 1 - 9	
Cascade Gold Dyke No. 10 - 21	CAMC No. 85683 - 98743
Telegraph No. 11 - 21	
No. Telegraph, No. Telegraph, No. 1 - 2	
Agua Dulce No. 18 - 51	

Situated in Sections 16, 17, 18, 19, 20; T. 15 No., R. 11 E.; San Bernardino Meridian, San Bernardino County, Latitude 35 23' Longitude 115 50' West at corner No. 2 of South Telegraph Lode Mining claim, (See original 'Working Interest Agreement and Sublease' in the following identified records: San Bernardino Co. File No. 81-072262.)

It is so ordered.

Let execution issue on this Judgment.

Dated this 16th day of September, 1985.

A. Sherman Christensen

Senior United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS, ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

ORDER AMENDING JUDGMENT
AND FINDING OF FACT
IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION IN
CASCADE V. BANKS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
No. C-82-1223C

CASCADE ENERGY AND METALS CORPORATION,
a Nevada corporation,

Plaintiff,

v

JEFFERY G. BANKS, et al,

Defendants

JEFFERY G. BANKS, ET AL,

Counterclaimants, Cross-laimants, and
Cross-Counterdefendants,

vs.

CASCADE ENERGY AND METALS CORP.,

Counterdefendant and
Cross-Counterclaimant,

and

W. DAVID WESTON, ET AL,

Cross-Counterclaimants
and Cross -Defendants.

The Motion to Amend Judgment dated September 26, 1985, brought by the Gold Technics defendants came regularly for hearing before the Honorable A. Sherman Christensen, Judge of the above-entitled Court, on November 13, 1985. Lynn P. Heward appeared on behalf of the cross-defendants Rex Montis Silver Co. and Telegraph Mine, Ltd.; Delwin T. Pond appeared on behalf of cross-defendant James F. Peters, Trustee of Gnolaum Unitrust; Dennis F. Olsen of Olsen and Associates appeared on behalf of the Gold Technics defendants; and George M. Haley of Haley & Stolebarger appeared on behalf of the investor

defendants. Argument of counsel was presented and the Court being fully advised, it is hereby

ORDERED that:

1. Finding No. 35 of the Findings of Fact on Accounting and Related Phases of Case entered herein and dated September 16, 1985, is amended to include reference to the Gnolaum Unitrust in the first sentence thereof, such that that sentence reads as follows:

> Interphase, Gold Technics, Telegraph Mine, Ltd., Telegraph Mine Joint Venture, Cascade, Gnolaum Unitrust, and Rex Montis are instrumentalities of Weston which were and are used by Weston for his own personal purposes.

2. An additional paragraph is added to the final Judgment herein dated September 16, 1985, relating to the rights and interests of the Gold Technics defendants in Gold Technics, Ltd. and other entities and assets subject to this lawsuit as follows:

> 5. Gold Technics, Ltd. is terminated and dissolved and shall have no separate right against any of the entities herein, and the Gold Technics defendants will have no rights or interests in the Telegraph Mine Lease, nor in the Telegraph Mine Joint Venture, nor in Gold Technics, Ltd., nor against any other entity against which Judgment is entered herein except as specifically set forth below or elsewhere in this Judgment. Likewise, the Gold Technics defendants are hereby individually relieved of any and all liability with respect to the Telegraph Joint Venture and to Gold Technics, Ltd., and to any other entity against

whom this Judgment is entered. W. David Weston, Rex Montis Silver Co., and related entities are hereby ordered to transfer and convey to the Gold Technics defendants the corresponding number of shares of Rex Montis stock set forth below. Since Gold Technics, Ltd. is dissolved, the Gold Technics defendants will each have a monetary judgment in their favor in the amount set forth below as their share of the Judgment which would otherwise be entered in favor of Gold Technics, Ltd.

Name	Shares	Judgment
Sam Harmatz	34,000	$5,979.38
Bernard Hodowski	34,000	5,979.38
A. C. Nejedly	34,000	5,979.38
H. E. Moses	34,000	5,979.38
Chris Waugh	66,000	8,969.07
Estate of Joe F. Duncan	88,000	11,958.76
Elliot Weinberg	22,000	2,989.69

DATED this day of , 1985.

BY THE COURT:

A. SHERMAN CHRISTENSEN, Judge

90-81

No. . . . .

FILED
JUN 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPELLANT APPENDIX "B - 1" PERTINENT APPEAL COURT BRIEFS AND INTERPRETIVE EXHIBITS

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BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

APPEAL BRIEF OF CROSS-APPELLANT CASCADE ENERGY AND METALS CORPORATION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
CASES NO. 86-1202, 86-1156, 86-1157

CASCADE ENERGY AND METALS CORPORATION

Plaintiff/Appellee
and cross-Appellant

vs.

JEFFERY G. BANKS, etc., et.al.,

Defendant/Appellant
and cross-Appellee

CROSS APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
THE HONORABLE SHERMAN A. CHRISTENSEN,
JUDGE

BRIEF OF CROSS-APPELLANT CASCADE ENERGY AND METALS CORPORATION

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STATEMENT OF JURISDICTION

This action was originally filed in the United States District Court for the District of Utah pursuant to 28 U.S.C. Section 1332 (diversity of citizenship). A final order Amending Judgment and Finding of Fact was issued by the District Court on November 20, 1985. An order extending time to file notice of appeal was signed by the District Court on December 18, 1985. Notice of Appeal was timely filed by appellants on January 17, 1986. Notice of Appeal was timely filed by cross-appellants on January 31, 1986. Jurisdiction in this court is based upon 28 U.S.C. Section 1291.

STATEMENT OF ISSUES

1. Did the trial court err in denying Cascade, as operating manager, damages against Associates who had entered into a joint venture agreement (JOA) for failure to pay their pro rata share of start-up production expenses and business expenses in connection with a mining venture.

2. Did the trial court err in finding that Cascade as operating manager had breached it's fiduciary duty to Associates and acted in bad faith by seeking reimbursement for start-up production costs.

STATEMENT OF FACTS

Cascade is the owner of the Telegraph Mine. In 1976 Cascade leased the mine to Telegraph Mine, Ltd.a Utah limited partnership ("Prime Lease" Ex. 300). Subsequently, in January of 1979, Telegraph Mine, Ltd. sold a 40% interest in the Prime Lease to Gold Technics Inc. a California corporation which was thereafter reorganized as Gold Technics, Ltd., a California limited partnership ("Gold Technics"

Ex. 305-306). In September of 1980, Rex Montis Silver Company ("Rex Montis"), the generalpartner of Gold Technics purchased 75% of Gold Technics' interest in the Prime Lease (District Court Docket Sheet Number (hereinafter "NR.") 206 Ex.B & Ex 303). The prime lease was then owned 60% by Telegraph Mine Ltd., 30% by Rex Montis and 10% by Gold Technics. Telegraph Mine Ltd., Rex Montis and Gold Technics were each parties to a Joint Venture Agreement dated January 24, 1979 (Ex.303) and a Venture Management Agreement (Ex.304) designating Cascade as the Managing Agent of the Telegraph Mine Joint Venture ("TJV").

In order to facilitate the development, production and sale of gold and silver from the mine, the TJV, through Cascade, in 1980 offered sublease and working interests in the mine. A total of 35 units were offered and sold pursuant to the Telegraph Mining Associates Confidential Memorandum ("Memorandum" Ex. 1). Each Purchaser ("Associate") entered into a Sublease and Working Interest Agreement ("Sublease" Ex.1C) in late 1980 with the Joint Venture through it's Managing Agent. To sublease the interest the Associates were to make annual lease payments to the TJV in the amount of 26% of the gross proceeds from the ore mined and sold until all mineable and merchantable gold and silver was removed ("lease term" Ex.1C p.2) but, in any event, not less than a minimum annual royalty (hereinafter "MAR") of $74,285 per unit. The MAR was paid in the years 1980 and 1981 by each Associate with $30,000 in cash and $44,285 in the form of a recourse promissory note for the years 1982 and following. Payments under the recourse royalty notes were to be made quarterly at the rate of $13.44 per ton of ore mined until fully paid. In the event the Associates failed to mine and sell ore equivalent to the value required to pay the MAR, the Associates could satisfy the obligation by delivering to the TJV another recourse note

for the amount due. Further, if an additional royalty note was required in 1982 the TJV could require the Associates to substitute a new note equal to the sum of the unpaid balance of the 1980 and 1981 notes plus the additional note (Ex.1C,p.5)

Contemporaneous with the execution of the subleases, each Associate entered into a Joint Operating Agreement of the Telegraph Mining Associates ("JOA" Ex.1D) which defined the joint venture relationship between the Associates in the operation of the mine. The Associates appointed Cascade as their common Operating Manager and placed upon Cascade certain agency duties, rights and responsibilities (Ex.1D,Par. 1,2,4,5,6,8,9,10, 11,13, 15,16, 17). Cascade, was required to expend the sum of $800,000 derived from a development loan borrowed by the Associates from the TJV partners (Ex.1D,p.6) in developing the mine pursuant to the mining plan set forth in the Memorandum, which contemplated development of the property by a) deepening an existing incline shaft; b) rehabilitating a second shaft and existing underground haulegways to minimize development costs; c) extending the existing haulegways to connect the two shafts underground; d) preparation of stopes at 400 foot level and working upwards to provide for ore removal (Ex.1,D.P4;G). Then to start-up production, to operate the Telegraph mine (Ex.1D.par.13), oversee the Telegraph Mine Associates project in all aspects (Ex.1Dpar.2), keep the books and records individually for each Associate's sole proprietorship mining business (Ex.1D,par.13(d);11) and to follow the instructions of a majority of the Associates (Ex.1D,par.15). The JOA specified that Cascade was to perform the above--mentioned services on a "best efforts" basis (Ex.1D,par.1,4; NR.215,par.2).

The JOA delineated two distinct phases of the mining process: (1) development (also referred to in the contracts as "pre-production"); and (2) production (Ex.1D,p.1). The development stage consisted of placing the property in a condition such that ore could be removed (Ex.1D, p.4). The production stage was to involve the mining, milling and processing of the ore into a marketable state (Ex.1D,par.13). Production generally consists of two phases: (1) start-up production (where production expenses exceed income from production) (Ex.117;Ex.229 p.2): Trial Transcript (hereinafter "TT") 260-65;2216,2214; NR.215 par.5,6); and (2) full production (where the cash flow from production is sufficient to finance continuing production costs as well as provide a profit).

Early in 1981 it became apparent to Cascade that unexpected cost increases coupled with ever increasing interest rates resulting from rampant inflation would require additional development funds and a modification to the existing mining plan (TT, p.446-451) After consulting with Mr. Harrison Salsbury, a metallurgical researcher with the United States Bureau of Mines, Cascade proposed and the Associates unanimously approved a temporary modification of the mining plan (TT, p.618-621,Ex. 39) which provided for an interim plan to mine surface ores in an open pit and extract the gold therefrom in a process known as "heap leaching". The heap leaching method was adopted by the Associates because the economic risks were less than those risks which might be experienced in the underground method previously approved. The plan was that the proceeds from heap leaching would finance further development of the property for underground mining which was still the objective of the Associates (Ex.39).

After approval of the modified mining plan in July of 1981, the project contemplated two stages of development and production, one for heap leaching and a later one

for underground mining. Under the modified plan, the $800,000 fund was to be used for development of the property for heap leaching. Unlike the development for underground mining there would be no sinking of a shaft in ore and no residual ore production from the development of underground haulegways to be sold as the work proceeded. Rather, development for heap leaching involved construction of a leach pad, containment ponds for barren and pregnant cyanide solution, fresh water storage, facilities to extract gold from cyanide solution, open pits for mining with access roads, overburden removal and ore storage facilities. Although the development and regulatory costs for heap leaching are less than for underground mining, there is a greater lag time between the end of development and the realization of full production. While there is a longer period of start-up production and attendant cash shortfall involved with heap leaching, once the heap leaching resulted in full production proceeds from production would be more than sufficient for underground mining development (Ex.117).

In July 1981, the Associates approved and adopted the "Telegraph Mining Associates Chargeable Cost Procedure" ("Charge Procedure") (Ex.40.01,41 p.2;NR..313 item III (1)(2);) which set forth the items to be reimbursed to Cascade for the mine operation. The charge procedure was not limited to charges for development expenses, but also expressly applied to charges for production expenses:

> "Cascade, as the Operating Manager of the Telegraph Mining Associates program, shall charge the Associates for developing and operating the Telegraph, as set forth below."(Emphasis added) (Ex.40.01)

The Charge Procedure specifically provided for reimburse-

ment of Cascade's out-of-pocket expenses incurred in operating the mine.

In September of 1981, the Associates formed a first Management Committee ("Mgt. Committee") consisting of Herbert Stoltenberg, Chris Waugh and Bernard Hodowski for purposes of overseeing Cascade's functions as the Operating Manager in the expenditure of the development loan (Ex.61A). The Associates Charge Procedure for reimbursement of chargeable costs was further recognized and adopted by the Associates Mgt. Committee in September of 1981 (Ex.40.01,66.1;NR.215,par 3,4). From September 1981 until March of 1982, the Mgt. Committee approved the work orders and each month's budget as submitted by Cascade pursuant to the procedure. During this period the Mgt. Committee controlled the development loan funds in a separate bank account from which they executed checks to pay for the work as it advanced (Ex.61A,p.11;TT,493-94,1199,1270).

In March of 1982 following the default of the following Associates the TJV Committee held a public sale (TT.2432-39) in which Cascade and Interphase Corp. purchased the defaulted interests by paying the 1981 MAR and assuming the development note obligations, which resulted in $165,000 of working capital for the TJV in 1982.

Defaulted Associates	Working Interests	Purchaser	Capital Acquired
McKean	1	Cascade	$30,000
Halverson	1/2	Cascade	$15,000
Benzer/Raffoni	1	Cascade	$30,000
Whitney	1	Cascade	$30,000
Jorgenson	1	Cascade	$30,000
McDonald	1	Interphase	$30,000
Total			$165,000

The above amounts were paid to the TJV by checks which were deposited into the TJV bank account and posted in TJV ledger account 1002 entitled "Continental Checking." The Cascade deposit was posted as entries No. 21 for $105,000 and No. 38 for $30,000. The Interphase deposit was posted as entry No. 44 for $30,000. The offsetting income account entry was posted into Ledger Account No. 3002 entitled "Royalty Income" as entry No's 260, 261 and 262. (NR. 310 par.17; NR.312,III,Ex.C.E,P.1,7).

In a letter dated April 15, 1982 from Cascade to the Management Committee, Cascade reported that the development loan had been fully expended and that, in March, production had commenced with the stockpiling of 1,500 tons of ore. The letter further stated:

> "The production expense, as shown on the statement for March and amounting to $24,493.99 **is being invoiced directly to each of the Associate members (which equates to approximately $700 for the 1st quarter on a per unit basis)**...." "Each of the Associates [has been given] a notice that unless arrangements are made to pay for the costs of mining and processing, royalty, taxes and such other expenses as are incurred in the operation, **the costs of mining will be billed to them directly on a quarterly basis** and sufficient ounces of the production necessary to over these costs will be sold...." (emphasis added). (Ex.41.03,p.1-2)

Thus, Cascade reported to the Mgt. Committee that the production costs would be billed to the Associates on a quarterly basis and that enough gold would eventually be sold to cover production costs and provide reimbursement to the Associates.

Five days later, in a letter dated April 20, 1982 (Ex. 86) Cascade accounted directly to each Associate for the

expenditure of the development loan funds and reported to them that Cascade had incurred additional expenses for start-up production costs. Cascade also provided notice to the Associates that such additional production cost expenses were the responsibility of the Associates:

> "now that production has commenced and with the expenditure of all of the loan funds, our quarterly reporting will take on a new format to reflect the costs of production, continuing exploration and development, and the results thereof. A copy of this format is submitted to you for the first quarterof production in 1982. The cost of production for the period shown is the amount which is now in excess of the development loan funds. The first quarter summary also reflects the necessity of selling such of the production, as it is produced to meet these on going mining costs. To date, these continuing expenses have been met by personal advances made by Cascade and myself. **These expenses are an Associate obligation.**" (emphasis added).

Attached to the April 20th letter to each Associate was the first quarter summary of production and an invoice showing production expenses of $699 per 1/35 unit with no proceeds from the sale of gold as yet (Ex.86).

The summary of production for the first quarter of 1982 set forth the tons of ore mined during the quarter and the production expenses in dollars as well as the average price of metals for the quarter. In addition each Associate was provided a "Telegraph Monthly Concentration Plant Summary" which set out the day to day production at the mine and the gold content in the mined ore. The summaries identified 1,145.5 tons as having been removed to the leach pad ready for gold extraction (Ex. 86).

Defendant Stoltenberg paid his first quarter assessment to Cascade on April 21, 1982 immediately after receiving the above referenced letter and invoice (TT,477-78; Ex.131.02;). Stoltenberg, an attorney, engineer and member of the Mgt. Committee, made no objection to the April 20th letter. No objections were voiced by any Associates to Cascade's April 1982 letter stating that expenses were an Associates' obligation until at least seven months had passed (TT.304,182; Telegraph Mining Associates August 14, 1982 meeting transcript Ex.93A, (hereinafter "93AT")).

By letter dated June 19, 1982 from Cascade to the Associates, Cascade informed the Associates that, due to certain force majeure events and the continuing decline in the price of gold, the project was experiencing cash flow problems during the "start-up production period" and notified them that Cascade would be requesting payment of the invoiced production costs for the second quarter which would be issued at the end of June (Ex.88;TT.137-39). Accordingly, each Associate was sent a second quarter summary of production and expenses showing production costs exceeding proceeds from production. Accompanying the second quarter production summary was a second quarter invoice, billing each Associate for it's pro rata share of the production costs for the second quarter (Ex.90).

By letter, dated July 19, 1982 Cascade reported to the Associates that it had completed the first full quarter of start-up production and reported losses due to force majeure events (Ex.91;TT,139-40). The letter concluded:

> "Nevertheless, thru (sic) the past start-up production period, our cash flow (gold sales) has fallen behind our start up expenses and this is reflected in your current statements for the 2nd Quarter. We would certainly like it to be otherwise, but it isn't. We have had our share of adversity in the

usual experiences of start up production, and frankly submit that in the overall industry experience we have done exceptionally well. These expenses have been made up from loans received by Cascade and reloaned to the program. The loans are secured by equipment necessary in the Telegraph Mine mining and crushing operations. These expenses now total $325,000 which includes the purchase of the head frame and its delivery to site. One such loan has been made to Cascade by the Downey State bank in the amount of $200,000. at 20% interest. The note is due August 3rd 1982. It is imperative that the note be reduced by at least $40,000 and the current interest paid. An additional note in the amount of $65,000 is due Sept. 6th at 19.5 % interest." "**Thus, it is absolutely necessary that the sums due Cascade, which Cascade has advanced to the operation be paid in order that Cascade meet its obligations. Therefore, as stressed in the May report, it is now necessary that you pay your fair share of the current start up production expenses as advanced until the continuing production and sale of precious metals catches up and overtakes these past production expenses.**" (emphasis added). (Ex.91,5-6).

On or about July 27, 1982, Weston received a telephone call from defendant Associate, Waugh, who questioned the amount of the second quarter billing from Cascade and informed Weston that five Associates, including Harmatz and Hodowksi who were certified public accountants, would be coming to Salt Lake on July 29th to conduct an audit of Cascade's books and records (TT,140,163).

In response to Waugh's inquiry, Weston offered to purchase Waugh's 1/70th Associate and other interests in the mine for $29,000 which offer Waugh accepted. Weston

informed Waugh that he would present Waugh with a cashiers check upon his arrival in Salt Lake City with the other Associates who were coming to conduct the audit (TT.1889-90).

On July 29, 1982 Associates Waugh, Bentz, Ashley, Harmatz and Hodowski arrived in Salt Lake City, for purposes of conducting an audit of Cascade's books and records (TT.163-65) Upon their arrival at the airport, Weston tendered to Waugh, a cashiers check in the amount of $29,000 for the purchase of his interest (TT.1889-90) as per their agreement of two days prior. Waugh refused the check stating it was not enough to purchase his interest. Weston drove the Associates to Cascade's offices where they spent the entire day from 9:30 a.m. to 11:00 p.m. auditing the books and records as maintained by Cascade for each Associate (TT,163-82). The focus of the audit was on the appropriateness of the expenditures as identified following the Associates Charge Procedures (Ex.40.01,p.4,par.4). During the audit no one questioned Cascade's right under the contract documents to assess the Associates for production costs (TT,167).

At the conclusion of the audit the Associates present expressed their satisfaction with Cascade's handling of the accounting and with the appropriateness of the expenses billed to the Associates (TT.173-182). The Associates present acknowledged the necessity of collecting the March and June production billings and directed Cascade to schedule an annual meeting of Associates in Las Vegas for the specific purpose of explaining the financial needs of the project in order to facilitate collection of the past assessments and to form a Management Committee to assist in collecting future assessments (TT,167-72;1990-91).

Subsequently, on August 14, 1982 an annual meeting of the Associates was held in Las Vegas (TT183-

84;Ex.93AT;Ex.97). At this meeting the following Associates were present:

> Ashley, Bentz, Cascade, Doub, Gnolaum Unitrust, Harmatz, Hodowski, Nickerson, Resource Concepts, Interphase Corporation, Smith, Stoltenberg, Waugh, Ohara, Higashi, Green. (Ex.97;TT,184-85)

The meeting was videotaped (Ex.93A) for the benefit of those Associates who could not attend and was sent to those Associates who requested copies (TT,85;Ex.93A).

During the August 14th meeting Cascade reported that the development loan funds had been fully expended during the first quarter. Cascade also reviewed the letters submitted to each Associate which gave notice that the Associates would be expected to reimburse Cascade for the expenses then being incurred by Cascade in their behalf (Ex.93A). The start-up production cash flow problems were also explained. Cal Griffith, Cascade's controller, provided a financial report and emphasized the need to have the assessments paid. Griffith made reference to and quoted from contract documents upon which Cascade relied in assessing the Associates for start-up production costs.

> Griffith: "...The accounts receivable from due Cascade from the Telegraph Mining Associates are in the area of $372,000 dollars. In the memorandum Exhibit "B" where we are talking about the Joint Operating Agreement I would like to read from paragraph 10 "compensation and Expenses of the Operating Manager" and I quote: "The purchasers agree that the Operating Manager shall be paid as compensation for...their services the sum of the following: reimbursement of it's out of pocket cost of management incurred for the program which

> shall include travel, expenses, a fair allocation of pro rata share of **operating,** handling, managing and overhead expenses...it is my belief that Cascade...has done their best to make sure the funds were expended in the most economical and feasible way. And I feel that there has been no mismanagement of funds...I calculated that it costs approximately 70 to 80,000 dollars a month to operate the mine...our accounts receivable from the Associates are starting to roll in. But it is imperative that these funds continue to roll in so we can meet our past obligations and continue to go forth in meeting our current obligations as they come due. (emphasis added) (Ex.93AT,p.39)

None of the Associates present at the meeting took issue with the statements that the Associates were contractually liable for the assessments (Ex.93AT).

After the presentation Hodowski spoke to the Associates concerning the results of the recently completed audit.

> "Good Morning. The five gentlemen that are present here went to Utah on July 30th, [sic] to satisfy the Telegraph Associates that things were being conducted in a business like manner. Frankly, I will admit that when we went up there we had an idea that there were some improprieties and I say that because I know David felt that this was the attitude that we had when we came up there. We arrived at9:00 a.m. and we spent the rest of the day - I think we quit finally at 11:30 p.m. - going through all the books and records, reviewing documents. We had discussions on every single point that we had a question on. I will say this that when we left we had a completely 180 degree opinion of how things were run. There are some minor questions

that wecan resolve in the future, but I would say that on a scale of 10 we probably felt that 99% of everything we examined was proper. At this time we also made an effort to portray to David that even though he is the manager at the mine, that we are here to help him ... at that time it was decided that we should elect a steering committee of Associates...."(Ex.93AT,p.53)

At the conclusion of the August 14, 1982 meeting the Associates present at the meeting elected a second Management Committee and subsequently a majority-in-interest entered into a Management Committee Agreement ("Mgt.Agreement"). The committee was comprised as follows: Bentz, Chairman, Ashley, Vice Chairman, Stoltenberg, Secretary and other members Hodowski, Waugh, Green and Smith. Subsequent to the August 14th meeting, the following defendant Associates made partial or full payments on their quarterly billings as set forth below (NR.313,III,Ex.A(4),"Management Accounting Ledgers," p.8,16, ledger accounts No. 1001 and 3000;Ex.125.7,TT.211-12;TTA.337).

Associate	Date	Amount
Harmatz and Hodowksi	7-17-82	9,231
Del Ashley	8-03-82,	9,231
Lionel Ascher	8-05-82,	4,615
Roger Mann	8-05-82,	2,000
Robert Doub	8-06-82,	9,231
Joseph Bogan	8-10-82,	9,231
Chris Waugh	8-14-82,	4,516
David Henry	8-16-82,	4,200
Sam Hambarian	8-20-82,	9,258
Peter Samarin	8-25-82,	5,000
Herb Stoltenberg	9-09-82,	3,400
George and Pat Slater	9-11-82,	2,308

Jeff Banks	9-30-82	1,000
George Slater 2nd	10-31-82,	2,308

On August 25, 1982, the 2nd Committee held its first meeting in Downey California (Ex.100). At that meeting the subject of assessments was discussed in the context that some Associates had not yet paid their assessments and several members of the 2nd Committee expressed that an effort should be made to obtain payment of the unpaid assessments. No one at the meeting, including Stoltenberg, voiced an objection concerning Cascade's right to assess the Associates for start up production costs (Ex.100).

At the August 25, 1982 meeting the 2nd Committee approved the language of the Telegraph Associates Resolution-Management Committee Agreement (Management Committee Agreement) which provides in pertinent part:

> "The Associates hereby constitute and appoint and by these presents do hereby make, constitute and appoint the management committee their true and lawful attorneys, for themselves, and in their name, and on their behalf to...(iv) to authorize expenditures of the Associates in carrying out the agency created by this agreement and power of attorney...."

Paragraph 3 of the Management Committee Agreement provides:"

> The management committee, nor any member thereof, shall not be responsible or liable for any assessments made to any associate."

Paragraph 8 of the Agreement reads in pertinent part:"

> ...it is expressly agreed that any costs incurred by

> the Operating Manager in complying with any special requests of the management committee shall be born proportionately by the Associates."

Finally, paragraph 10 of the Agreement states:

> "Each of the members of the Management committee and theOperating Manager shall be indemnified by and reimbursedby the Associates for any personal liability, expense orloss or damage resulting from Torts, in the administrationof or enactment of the agency created hereby."

It was agreed that the Management Committee Agreement would be prepared in final form and forwarded to each Associate for signature. Cascade requested such an agreement before it would incur further production expenseson behalf of the Associates (Ex.93AT, p.21; TT.98; TTA.338). The Agreement was sent to all the Associates along with a bulletin for August reporting the July and August production as well as the proceedings of the August 14th Associates meeting (Ex.97). The agreement was signed by a majority in interest of the Associates, including all of the defendants (Ex.98). In addition, the bulletin reiterated the need for the payment by the Associates of their second quarter billings by no later than September 20, 1982 if production were to continue at the mine. None of the Associates reacted to the August bulletin by claiming that the contracts were non-assessable.

At the next Committee meeting held on September 13, 1982 in Downey, California, the subject of assessments again came up (Ex.103). Cascade distributed an accounting which showed the amount each Associate had paid toward their second quarter billings and emphasized that if not paid soon, serious cash flow problems would result which would jeopardize and encumber the Associates continued opera-

tion of the mine (Ex.103A). As with the other requests of Cascade for payment of the assessments none of the Associates made the claim of nonassessability. Rather, some of the discussion focused on a reduction of the amounts assessed by Cascade where in the view of some members of the 2nd Committee the ore crushed by Cascade failed to meet a minimum standard of commercial value. With regard to that discussion, the minutes for that meeting read as follows:"

> 7. Del Ashley pointed out that the August production records indicated that in 15 out of the 23 instances in which assays were made, the assays were less than the .12 oz. of gold to the ton which had been considered the cut-off point forcommercial ore."
>
> "Mr. Weston said that in July and August much of the ore which was crushed and piled came from the ore dump which remained from the early (1930's and 1940's) operation of the mine, and that much of the dump was fairly low-grade ore."
>
> "Del Ashley asked if, since the tailings piles didn't require as high crushing or mining costs as regular ore, **would there be a reduction in these costs to the Associates**."
>
> **"Del Ashley also suggested that the Associates should not be required to pay for the crushing, hauling, loading, etc. of ore that did not have sufficient values to be commercial."**
>
> "A final decision was not made with respect to either of the last two questions."
>
> "8. Del Ashley suggested that a minimum standard

be established for ore to be mined, crushed, and processed. After discussion, it was decided that ore containing $36.00 of gold per ton be established as the minimum to be mined and processed...."

"**It was decided that a monetary adjustment should be made for all ore mined and processed which did not meet the agreed standards**. Mr. Weston agreed to make a proposal concerning the formula to be used in making such adjustments." (emphasis added) (Ex.103)

The issue of reduction of the assessed costs for non-commercial ore arose again at the next Committee meeting held on September, 20, 1982 in Long Beach, California (Ex.104). The minutes of that meeting read in pertinent part:"

3. Discussion then ensued concerning whether cost adjustments should be expected from the Operator with respect to any non-commercial ore which might have been mined, crushed and otherwise processed in the past, either because of unsatisfactory ore control or inaccurate assay techniques, or both. The consensus of the Committee was that such adjustments should be expected; however, no formal action was taken in the matter."

By letter dated September 18, 1982 from Cascade to the nonpaying Associates, Cascade gave notice of default and made formal demand for the unpaid assessments, specifically citing paragraphs 13(a) and (b) of the Joint Operating Agreement. The letter explained that if the assessments were not fully paid by October 20, 1982 the

nonpaying Associates' interests in the mine would be subject to forfeiture due to the default (Ex.105,TT.224-25).

Thereafter, California committee members sent a letter to Cascade dated November 9, 1982 informing Cascade of an informal decision of some members of the 2nd Committee to offer to purchase for the Associates, six thousand pounds of cyanide in order to extract gold from the leach pile, but only on the condition that Cascade would meet the demands set forth in the letter (Ex.114). Among the demands contained in the letter were adjustments in the amounts assessed the Associates for non-commercial ore, poor assay results and retirement benefits for employees (Ex.114,p.2).

Cascade received a letter dated November 15, 1982 from Herb Stoltenberg, on behalf of the 2nd Committee, to Cascade, setting forth certain directives from the committee to Cascade and the TJV (Ex.120). He directed the TJV to defer action for thirty days from October 10, 1982 on the notices of default previously sent to the non-paying Associates and that interest on the unpaid assessments should accrue at the rate of eighteen percent (18%) per annum.

In November 1982, Stoltenberg contacted Cascade and requested that Cascade prepare a promissory note providing for monthly installments for Stoltenberg to give as payment of the balance on his assessments (Ex.124). In response, Cascade forwarded to Stoltenberg a proposed promissory note providing for installment payments of Stoltenberg's unpaid share of the production costs. In addition, on or about November 16, 1982, Harmatz and Hodowski forwarded a check to Cascade in the amount of $4,500 in payment of the balance owing on the promissory note they had tendered in payment of their second quarter billing (Ex.125.7).

Not until the end of November, 1982, after Cascade had retained an attorney to collect the assessments and

after the attorney had sent a demand letter to the non-paying Associates, did Cascade receive communication from any of the Associates questioning the position consistently taken by Cascade that the Associates were liable for the assessments under the contracts. The issue was raised for the first time in a letter dated November 29, 1982 from Coastal Computers to David Weston (Ex.126,129). By letter dated December 2, 1982, Stoltenberg first notified Cascade that he viewed the contracts as nonassessable except out of the proceeds from production (TT.304 Ex.131.14) Shortly thereafter this litigation commenced.

Approximately four months later, in April of 1983, each of the Defendant Associates filed an accrual tax return for their individual sole proprietorship mining business (schedule C) in accordance with IRS section 461 and treasury regulation section 1.461.1-1(a)(2) which the assessments charged by Cascade during the year 1982 were deducted from their ordinary income regardless of whether the assessments were paid (TT.1432-33,2118-23;Ex.544,546,549).

A significant number of the Associates who are not parties to this action testified at trial or submitted affidavits explaining that they understood the contracts were assessable and they have always interpreted the agreements as such (TT.1110-1115,1136-37,1140-41;NR.267). Further, these Associates i.e. Joseph Green, Harold Masunaga, Yukio Ayabe, Charles Higashi, Marion Harada, Dr. Ohara and Lyle Muller have all paid in full the amounts assessed them by Cascade for production costs (NR.267).

ARGUMENT

I.
THE TRIAL COURT ERRED IN DENYING CASCADE DAMAGES AGAINST THE ASSOCIATES FOR FAILURE TO PAY THEIR PRO RATA SHARE OF START-UP PRODUCTION EXPENSES.

STANDARD OF REVIEW: The interpretation of a contract is a question of law for the Court's determination. Orson v. United States Fidelity and Guaranty Co., 587 P.2d 149 (Utah 1978). The trial court's conclusion on the interpretation of the contract is freely reviewable on appeal because it is a question of law, not of fact. Where the trial court finds that an ambiguity exists so that it is necessary to resolve factual questions as to the parties' intentions, the court's findings are reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). United States Fidelity & Guaranty Co. v. Newman, 656 F.2d 457 (9th 1981). Thus, to the extent the appellate review involves an interpretation of the contract language by itself without reference to extrinsic evidence regarding the parties' intentions, the review is strictly a legal interpretation. However, to the extent the review involves factual findings of the judge with regard to the parties' intentions as to the interpretation of the contracts, such findings should not be set aside unless clearly erroneous. The trial court's finding are clearly erroneous when, although there is evidence to support them, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. United States v. Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed 746 (1948).

The trial court held that the Associates were liable under the Joint Operating Agreement ("JOA") and other

contract documents only for the minimum annual royalties and their pro rata share of the $800,000.00 development loan and not for assessments for production costs (Amend. Conc. of Law No.7,Amend Finding No. 106). The trial court appears to have adopted an interpretation of paragraph 13(c) of the JOA that the Associates were not liable for start-up production costs except as offsets to proceeds from production. As a result the respective joint venture sublease interest held by the Associates were found to be nonassessable (Amend Finding Nos. 36,37,66,103,104). The JOA and the other contracts were to be construed under Utah law. Utah law is well established that, where questions arise in giving effect to a written document, the first source of inquiry is within the document. The document should be viewed in its entirety so that all of its parts can be given effect in accordance with its overall purpose. Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980); Minshew v. Chevron Oil Co., 575 P.2d 192 (Utah 1978).

Further, where two or more instruments concerning the same subject matter are executed by the same parties contemporaneously, or at different times in the course of the same transaction, they should be read and construed together so far as determining the respective rights of the parties. Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1973). Accordingly, the JOA, the Sublease, Memorandum, Charge Procedure and Mgt. Agreement must be read and construed together to determine the intention of the parties.

An interpretation of the documents which renders the contract possible and capable of achieving its purposes should be preferred to one which makes its performance impossible. Stangl v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976). As specifically discussed infra, where the contract documents are subject to interpretation, the course of conduct of the parties may be viewed as an aid to the court in

understanding and interpreting the documents so that they can appropriately be enforced. Once the agreement of the parties has been determined, the courts obligation is to enforce the agreement without regard to any determination that one party or another made a wise or unwise decision with respect to entering into such agreements. Skousen v. Smith, 27 Utah 2d 169, 493 P.2d 1003,1005 (1972).

The liability of the Associates for their proportionate share of the production expenses is unambiguously expressed in the paragraphs 10(a), 13(a) and (b) of the JOA. Particularly, paragraph 13 (b) provides:

> "(b) All costs and liabilities incurred in the exploration and development of the Property and the mining, milling and removal of ore therefrom shall be borne and paid for by the Purchasers (Associates) in proportion to their interests.

The Associates contractually agreed to be liable for the costs of "mining", as well as the costs of "milling" and any costs associated with "removal of ore" which are production costs.

Subsection (c) of paragraph 13, however, places a floor under the Associates' liability under subsection (b) for production costs directly related to mining uneconomical ore. It reads as follows:

> "(c) Notwithstanding anything to the contrary contained herein, the Operating Manager (Cascade) shall have no authority, express or implied, to enter into any commitment or obligation on behalf of the Purchasers or otherwise do anything which would subject thePurchasers, or any of them, to any liability in excess of the Purchasers' respective interests in the minerals mined, milled and

removed from the Property and their interest in any proceeds from the sale of said minerals."

This language was originally intended to cover the mining, milling and extraction activities contemplated with underground mining of ore, which thereafter required milling to include crushing, grinding and concentration and from which the recovery and sale of gold would be almost immediate. With the change to a heap leaching mining plan, which was adopted and approved by all the parties, Section 13, of necessity, also took on a changed meaning. Heap leaching did not require grinding or concentration of the minerals. Instead, the available gold and silver were removed directly from the cyanide solution as it was leached over a long period of time. To have meaning the contract, would of necessity have to be construed as now including removal to a leach pad for gold extraction over time and purification followed by the sale of the purified metals.

The Associates contended at trial, and apparently the trial court adopted the interpretation, (See Amended Finding of Facts Nos. 36 and 66) that paragraph 13(c) should be interpreted as negating any personal liability of the Associates for production costs except out of the final proceeds from the sale of minerals produced. In other words, the Associates were only liable for production costs in the sense that such costs were to be deducted from each Associate's share of the proceeds as the minerals were sold. Under the trial court's interpretation, Cascade, could not assess the Associates for production costs during the leaching start-up period or other periods where, due to force majeure events (NR.213), cash flow from production was insufficient to pay the continuing costs of production. Cascade asserts, however, that paragraph 13(c) was not intended to negate the Associates' liability under paragraph 13(b) for the start-up production costs but, rather was intended to protect the sole

proprietor Associates by restricting the Operating Manager from charging for any ore produced which, when sold, was insufficient to recover the production costs. Thus, under Cascade's interpretation of paragraphs 10(a) and 13, Cascade could assess the Associates for production costs until cash flow was sufficient to pay such costs. Cascade could not assess the Associates beyond the gross value of their interests in the minerals mined, milled and removed to the leach pad and their interests in the proceeds which were due from the sale of any minerals. Such interpretation provided a means for the financing of production costs by the Associates through their joint venture during the start-up period and assured later reimbursement of the production costs paid by the Associates during that period (NR.289,Ex.A; Ex. 129).

This interpretation of paragraphs 13(b) and (c) of the JOA is consistent and harmonious with the other provisions of the contract documents. At page 11 of the Confidential Memorandum it states:"

> Liabilities of Purchasers: Purchasers will be generally liable for their ratable portions of certain losses of the Program in excess of their investment, ..."

In addition, at page 20 of the Memorandum, enumerating the Risk Factors generally assumed by a sole proprietorship, it reads:

> "1. General Risks. Each Purchaser will be subject to the risks generally incident to the ownership and operation of mineral properties, as well as changes in general economic conditions, operating expenses, governmental rules and fiscal policies, acts of God and other factors which are beyond the control of the Program. Thus, all of the risks normally

attendant to the operation of a business are present in the extraction of minerals which is the purpose of owning the Working Interest." (emphasis added).

Similarly, page 21 of the Memorandum, states:

"5. Mining Industry - Labor Disruptions. Mining as a business is highly speculative because of the many obstacles which may be encountered in Mining, which may cause delays or require add-itional working capital ...."

Further, at page 23 of the Memorandum, paragraph 6, it reads:

"10. Purchaser's Unlimited Personal Liability. Although each Purchaser will have no personal liability under the terms of the Working Interest Agreement, except for the recourse Royalty Note and the Development Loan, each Purchaser should be aware of the fact that the Working Interests are not limited partnership interests in the property. As the owners of Working Interests, each Purchaser is subject to unlimited liability over and above his investment for matters which might occur as a result of the activities, including operations under the Joint OperatingAgreement...." (emphasis added).

Paragraph 10 of the JOA also imposes liability on the Associate sole proprietors for the operating costs of their mining business above their initial investment. Paragraph 10(a) reads as follows:

"10. Compensation and Expenses of Operating Manager. The Purchasers agree that the Operating

> Manager shall be paid compensation for his services the sum of the following:
>
> (a) Reimbursement of its out-of-pocket costs of management incurred for the Program which shall include...a fair allocation or pro rata share of operating, handling, managing and overhead expenses,....." (emphasis added).

In the Sublease the production and or the results of the lack of production is obviously the liability and obligation of the sublessees. Article 4 states:

> "..in the event Sublessee shall fail to mine, sell and pay royalties with respect to his proportionate share of minerals...by the end of December...Sublessee shall pay...difference between royalties paid and...minimum annual royalty."

Accordingly, the provisions of the contract documents are consistent in demonstrating that the Associates were at risk for expenses associated with start-up production expenses (NR.249,pp.12-24). The trial court's interpretation that the contracts are nonassessable except out of production should be rejected for the additional reason that it defeats the purposes and objectives of the contracts and renders them difficult if not impossible to perform. Stangl v. Todd, supra The clear purpose of the project was the production of minerals at a profit. The Associates acquired a tax sheltered net profits ownership interest in the project and assumed the risks of development and production Miller v United States, 41 AFTR 2d 78-376 (DC Cal.1977) (IRS Regulation 461,465). It was expected the cash flow from production would finance continued production, except during the initial period of start-up production immediately following the development of the property and

during periods where force majeure events resulted in production costs exceeding income from the sale of minerals. In interpreting the contracts to be nonassessable the court found that no method was provided for in the contracts to finance production costs during the start-up and force majeure periods (Finding 104). Consequently with no provisions in the contracts providing for financing start-up production costs and with the Associates unwilling to voluntarily pay such costs the trial court found that the contracts had become impossible to perform. (Finding 116).

The contracts do, however, provide for assessability limited by the value of each Associate's respective interest in the minerals mined and on the leach pad and in the proceeds from the sale of said minerals (Ex.1D, par.10 (a)(b), par.13; TT.416-21;Ex.129). This view renders performance under the contract possible and the purpose achievable by providing a means for the financing of start-up production costs and costs incurred during periods of force majeure events. It would seem only reasonable that sophisticated parties such as those involved in this case would have intended to structure a business plan capable of accomplishing their profitable production objective and would not have intended to enter into a contract which undercapitalized the most important phase of the project (NR.267). As stated in 4 Williston on Contracts, Section 619 (3rd. ed. 1961):

> "...[A]n interpretation which gives effect to the main apparent purpose of the contract is favored:"It is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and in case of ambiguity produced by its minorprovisions, the latter should, if possible, be so construed so as not to conflict with the main purpose...."

Further, at Section 420 of Williston, it reads:

> "...[A]n interpretation which renders the contract agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless."

A subsidiary purpose of the contract was the tax benefit from deducting the royalty and development note to be derived by the Associates to reduce the capital risks inherent in a mining venture as stated in the Memorandum (Ex.1.Ex.H,;Ex.1.23). These tax benefits are largely dependent on the requirement that the Associates' be burdened with the cost of development and operation of the property for their net profit interest in the mine operations Miller v United States, supra, and which is absolutely necessary for the Associates to avoid being taxed as a corporation. The Memorandum, sets forth the IRS's view of the required features of a JOA for the holders of net profit interests:

> "(1) The costs of development and expenses of operation are to be prorated among the parties in accordance with their respective interests." (Ex.1H, p.3)

The trial court's interpretation that the Associates are not personally liable beyond their development loan and royalty note obligations, is not supported by the tax regulations for advanced MAR (IRS Code section 465) and defeats the tax benefits contemplated by the contract documents and should be rejected on that additional ground.

Further, under the doctrine of "practical construction", when a contract is ambiguous and the parties place their own construction on the agreement and so perform the

court may consider that construction as persuasive evidence of what the parties intended by the agreement. Zeece v. Siegel's Estate, 534 P.2d 85 (Utah 1975); Bullough v.Simms, 16 Utah 2d 304, 400 P.2d 20 (1965). Indeed, the interpretation given to the contract by the parties themselves, as shown by their conduct, will be adopted by the court. Hardinge Company v.Eimco Corp., 1 Utah 2d 320, 323, 266 P.2d 494 (1954). The principle of practical construction applies to those acts performed before any dispute over the contract arises. United California Bank v. Prudential Insurance Company of America, 140 Ariz. 238, 681 P.2d 390 (Ariz. App. 1983).

That Cascade always understood the Associates were liable for production expenses until cash flow was sufficient to cover such expenses is not only clear from Cascade's Charge Procedure (Ex.40.01) adopted in July of 1981, which was followed by the Mgt. Committee but also from it's first communications with the Management Committee and the Associates after the development loan had been expended. Cascade's April 15, 1982 letter to the Management Committee reported that the development loan had been fully expended and production commenced in March. The letter also informed the committee the production expenses for March totalled over $24,000 or approximately $700 per unit which amount was being invoiced directly to each Associate and that thereafter "the costs of mining will be billed to them (the Associates) in a quarterly basis..." (Ex.41.03,1-2)

Defendant Herbert Stoltenberg, attorney and member of the Associates Mgt. Committees, also understood that the Associates were liable for the production expenses until the project was in full production as is evidenced by payment of his $1,400.00 first quarter assessment on April 21, 1982 after he received the April 15th and 20th letter from

Cascade and other communication with Cascade regarding the assessments. Stoltenberg, admitted and then later attempted to explain away payment of his first quarter assessment by somehow claiming he made it as part of an election to take his gold in kind. However, his May 5, 1982 letter to Cascade clearly indicates that he recognized his liability for the first quarter production costs when he stated that his $1,400.00 payment "...was my share of the production costs for the quarter ended March 31, 1982, and which I paid you in cash on April 21st..." (Ex.131.02)

The July 19, 1982 audit of Cascade's Associate records as accounted for in accordance with the Charge Procedure (Ex.41.01,p.4) conducted by Harmatz and Hodowksi and several other Associates reveals the understanding of the Associates present that Cascade could assess them for start-up production expenses. The purpose of the audit was to verify the legitimacy and amount of Cascade's expenditures (TT.163-82). However, none of the Associates who participated voiced objections to Cascades right to charge the Associates for legitimate operating expenses. Moreover, at the conclusion of the audit, the Associates expressed their satisfaction with the appropriatness of the expenses billed to the Associates and directed Cascade to hold an annual meeting of the Associates for purposes of reporting the status of the project and to assist Cascade in collecting the assessments (TT.173-82). Further, shortly after the July 29 audit, Associates Ashley, Bentz, Waugh, Harmatz and Hodowksi paid their second quarter assessments.

The parties intent regarding assessability was also manifest in the August 14, 1982 meeting of Associates in Las Vegas. At the meeting, Cascade stressed the Associates contractual liability for the assessments. Indeed, Cascade's accountant quoted specific provisions of the contract documents upon which the assessability was based (Ex.93AT

p.39-41). None of the Associates voiced objections to Cascade's right to make assessments under the contracts. Further, Defendant Stoltenberg told Weston and Joseph Green that he intended to pay his assessments (TT.1054,1136). Several of the Associates made partial or full payments of their assessments after the August 14th meeting. These payments were made by the Associates with the full understanding that the project was behind schedule and experiencing cash flow problems.

At the August 25th meeting, the Mgt. committee approved the language of the Mgt. Agreement (TT.211-214,220) which was later signed by a majority of the Associates (NR. 265 Uncontested Fact No.40). That agreement appointed the 2nd Mgt Committee as the agents of the Associates for purposes of directing Cascade in the operation of the mine and in particular to authorize expenditures of the Associates in the mine's operation (TT.1112). Paragraph 3, impliedly recognized the Associates liability for the assessments under the JOA. In paragraph 8 the Associates expressly agree on a pro rata basis to reimburse Cascade for any costs incurred in complying with requests or directives of the Mgt. Committee. Cascade relied on this agreement as confirming the parties understanding of the liability for the assessments under the JOA (TT.216-18). Further, Cascade accepted this agreement as an independent basis for charging the Associates for production costs authorized and directed by the Mgt. Committee (TTA.332-334).

When the subject of assessments came up at the September 13th and 20th 1982 Management Committee meetings, it was in the same context as paragraph 13(c), that the amounts of the assessments should be reduced where the ore mined, crushed and processed by Cascade failed to meet a minimum standard of commercial value.

That the Associates understood that they were obligated to pay the assessments is further evidenced by their Management Committee directive to Cascade contained in Stoltenberg's November 15, 1982 directive to charge the nonpaying Associates 18% per annum interest on the unpaid assessments (Ex.120).

In addition, during the period following the August meeting through November of 1982 Cascade continued to correspond with the Associates and repeatedly emphasized the necessity of paying their assessments. Although some of the Associates questioned the extent of the assessments, none of them expressed the view that the contracts were nonassessable. The only reasonable inference from the continuing silence as to any question regarding assessability is that they understood they were obligated for the start-up production costs if there were shortfalls.

Not until November 29, 1982 did any of the Associates question Cascades' right to assess them for expenses under the contracts. It was at this point that the issue of nonassessability, as developed in this litigation, was first presented. The clear course of conduct by all parties prior to this time demonstrated that the parties viewed the contracts as assessable.

Finally, the Associates' understanding that they were personally liable for the assessments is further manifest by their claiming the 1982 unpaid assessments as deductions on their 1982 Federal Income Tax Returns for their individual mining business. The deductions were taken by all the Associates on an accrual basis even for assessments not paid in 1982. By deducting the unpaid assessments in the year accrued they acknowledged liability for such unpaid assessments. See page 18, supra.

The joint venture Associates, who were not parties to this action, also understood that the contracts were assessable. Each of these Associates have paid, in full, their

assessed production costs.Further, each of these paying Associates submitted an affidavit (NR.267) or testified at trial stating that they interpreted the contracts to be assessable and relied on the non-paying Associates to meet their pro rata share of the production costs at the time they acquired their working interest in order to assure themselves that their mining business interests would not be undercapitalized (TT.1136-37,1140-41). In particular, Harold Masunaga testified when questioned regarding his obligation to pay start-up production assessments (TT.1110-1112):

> "I have read the memorandum. And I know that I was obligated to pay my prorated share...I felt I was like a General Partner where I was liable for all expenses that were incurred during the production..."
>
> "...Cascade as an operator would be taking instructions from the management committee, and the management committee would ask for funds from us to be prorated to the other Associates."

Thus, the conduct of all the parties to the contracts, before the dispute over assessments arose, clearly manifests their understanding that the Associates were personally liable for production costs until cash flow from production was sufficient to cover such costs. The trial court therefore, erred in failing to give effect to that construction of the contract placed on it by the parties.

Even if the court were to find that the literal language of the contract document did not clearly provide for assessing the Associates their share of start-up production expenses, the court should nevertheless hold that such an obligation was implied by the parties. The conduct of the parties and the surrounding circumstances, as set forth above, clearly manifest the parties intentions sufficient to

find an implied agreement that the Associates would pay the start-up production costs.

This case also presents a classical situation for the application of the equitable estoppel doctrine. Because of the acts and conduct of the Associates throughout the period from April to November, 1982, Cascade was induced to incur significant expenses for start-up production for the benefit of the Associates which have not been reimbursed. Cascade relied, to its detriment, on the foregoing conduct of the Associates in continuing to incur expenses and advanced the costs of production.

II.
THE TRIAL COURT ERRED IN FINDING THAT CASCADE, BREACHED ITS FIDUCIARY DUTY TO THE ASSOCIATES AND ACTED IN BAD FAITH BY SEEKING REIMBURSEMENT FOR START-UP PRODUCTION COSTS.

STANDARD OF REVIEW: The trial court's findings shall be set aside if found to be clearly erroneous.

The trial court found that Cascade, breached its fiduciary duty of good faith to the Associates by seeking to impose liability on the Associates for the assessments and in bringing an action to collect the assessments. This finding of bad faith was premised by the trial court on the following: (1) that the contracts were nonassessable and start-up production costs were to be paid out of the proceeds of production; (2) that Cascade knew the contracts were nonassessable; (3) that, at some point, Cascade realized that production proceeds during the initial start-up period of production were not going to be sufficient to meet production costs and that the only means for maintaining continued operations at the mine was to seek additional financing from

the Associates beyond their contractual liability; (4) that initially Cascade hoped it could get the Associates to pay voluntarily by falsely representing to them that the project would quickly be in full production and that they would soon be reimbursed for any payments made; and (5) that when the Associates failed to make the payments voluntarily, Cascade devised the theory that the Associates were liable for the production costs under the contracts.

Cascade has set forth its preceding argument that the trial court erred in holding the contracts were nonassessable. As the contracts were assessable Cascade did not act in bad faith in seeking to collect the assessments from the Associates.

Even should this Court uphold the trial court's determination that the contracts are nonassessable, if Cascade's interpretation of such contracts was reasonable there can be no bad faith. As has already been fully discussed, the evidence supports the contention that Cascade understood the agreements to provide for the liability of the Associates for production costs during the start-up period when cash flow was not sufficient to cover such costs. Thus, Cascade did not act in bad faith in seeking to collect the assessments which it reasonably believed were the Associates' obligation.

The trial court's finding that Cascade misrepresented the immediate profitability or cash flow of the project in order to induce the Associates to pay the assessments beyond their contractual liability on the hope of immediate reimbursement from production is unsupported by the evidence. The April 1982 correspondence from Cascade to the Associates and their Management Committee reflected Cascade's expectation that the mine would be in full production during the second quarter. This expectation was reasonable at the time based on the progress at the mine during the first quarter. However, Cascade's correspon-

dence and communications to the Associates from May 1982 and afterward disclose cash flow problems and delays due to force majeure events and, later on, due, in large part, to the Associates' failure to timely pay their assessments despite the delays. Despite these set backs, Cascade continued to believe in the eventual success of the project. Nevertheless, Cascade, in its communications with the Associates fully disclosed the problems experienced during the start-up period (Ex.93AT).

That Cascade continued to maintain a good faith belief in the success of the project as late as mid-1982, is manifest when Cascade's chief officer, W. David Weston, on July 29, 1982, offered to purchase Chris Waugh's interest in the mine and for that purpose tendered to Waugh a cashiers check for $29,000 after mortgaging his home (Finding 97). In addition, Cascade in 1982 purchased 5 defaulted units and paid the MAR, assumed the development note obligations and paid its full pro rata share of the production assessments (NR.313,Exhibit A(4),p.16 ledger account No.3000).

A further indicator that Cascade's good faith belief in the eventual profitability of the mine continued throughout 1982 was Cascade's commitment of it's own credit and resources to provide working capital until it received reimbursement from the quarterly billings to keep the mine in operation throughout 1982 Finding Nos.101, 105). As late as July 30, 1982, Cascade, in its own name, borrowed $35,000 from Zion's First National Bank which Cascade put into the project. Further, on or about August 31, 1982, Cascade applied to the project approximately $30,000 which were the proceeds from the sale of certain real property owned by Cascade. Similarly, in December of 1982 Cascade put another $53,000 into the mine operations which Cascade had received from the sale of another piece of realty owned by Cascade.

Cascade's willingness to commit its own credit and resources to the project throughout the year 1982 not only indicates Cascade's good faith in the profitability of the mine, but also, its understanding that the agreements were assessable and that Cascade would be reimbursed quarterly for its services and direct expenditures as the Operating Manager. Moreover, Cascade's continued faith in the ultimate profitability of the mine was supported by mining engineer Martin Hughes' report to the Associates in October of 1982 to the effect that delays, such as those experienced at the Telegraph Mine, were not uncommon and that if the Associates would support the project it was at the point that it would be very profitable as follows (Ex.229):

> "This project has been initiated in a very good and effective manner. If, properly supported, it is now at the point of consistent operation and good results."

Even should this court uphold the trial court's determination that Cascade acted in bad faith, there remains the important issue of when the bad faith occurred. The timing of the bad faith is significant in that if the bad faith occurred after the Associates made their assessment payments, Cascade should not be required to make restitution for such payments to the Associates.

The trial court's Findings on the timing of the bad faith, are inconsistent. In Amended Findings No. 97 and 117, the trial court specifically found that Cascade and it's chief officer David Weston acted in good faith at least up through November 1982 as evidenced by: (1) Cascades advancing of it's own funds and resources to keep the project going; (2) Weston's offer to buy Waugh out; (3) "many other circumstances shown by the evidence".

Weston's offer to buy Waugh out occurred on July 29, 1982 and Cascade and others continued to commit their credit and resources to the project until December 1982. However the court in it's findings, focused on November 1982 as the period in which Cascade's bad faith commenced. The Courts finding specifically stated:

> "...By November 1982,...Cascade had in effect suspended mining operations and reported to the Associates that the property was...on a maintenance basis...From that point Cascade's efforts turned from managing the mine within the intendements of the agreements with realistic hope of producing the expense of operation at a profit, to a program simply to compel the Associates to make unwarranted contributions for an indefinite period of time for which they were not bound." (Finding No. 117)

Nevertheless, in Finding No. 18 of the accounting hearing findings (NR.336) (hereinafter "AFinding"), the court specified July 28, 1981 as the date when Cascade's bad faith commenced.

At the accounting hearing the trial court misinterpreted some of the testimony presented at that hearing concerning Cascades reliance on the Mgt. Agreement (Ex.98) as a basis for making the assessments (TT.282-287,331-332). Although, Cascade had taken the position throughout the course of the lawsuit that it had relied on the terms of the Mgt. Agreement in assessing the Associates for some of the production expenses, the court, perceived this as a new position, not previously asserted by Cascade (which would defeat the court's earlier award of restitution of the assessments paid in 1982) and was influenced to make the finding that the bad faith had commenced at an earlier date (AFinding Nos. 15,16,17,18).

The record, indisputably reflects that Cascade, from the commencement of the action, relied, not only on the JOA, but also on the Mgt. Agreement in assessing for production expenses after the date of the Mgt. Agreement. Such position is reflected in Cascade's complaint (NR.27,p.21), to which a copy of the Mgt. Agreement was attached as an exhibit, in early correspondence (Ex.129), in Cascade's motion for Partial Summary Judgment (NR.249;NR.250;NR.254) and in Weston's testimony at trial (TT.214-218,244,279) and earlier by the court (TT.pp.81-84 March 26, 1985).

Thus, the trial court's perception that Weston was attempting at the accounting hearing to take a new position with regard to the significance of the Mgt. Agreement in order to avoid the trial court's findings that the Associates were nonassessable is not supported by the record. The court's finding of the July 1981 date for commencement of bad faith is inconsistent with the court's other findings that Cascade's good faith continued up until November of 1982.

Accordingly if this court upholds the finding of bad faith, Cascade submits that such bad faith did not commence before November of 1982 as Cascade continued to commit it's resources and credit to the project up until December of 1982. Therefore, Cascade should not be required to make restitution to the Associates for assessments paid prior to that time. It is indeed ironical that so many inconsistencies exist in the bad faith findings while the implication of such findings permeate so much of the award of damages ordered by the trial court. ...

Dated this 13th day of March 1987.

Respectfully Submitted

by Steven W. Snarr Esq.
Michael E. Talbot

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

APPEAL BRIEF OF CROSS-APPELLANT THE GNOLAUM UNITRUST

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
CASES NO. 86-1202, 86-1156, 86-1157

CASCADE ENERGY AND METALS CORPORATION

Plaintiff/Appellee
and cross-Appellant

vs.

JEFFERY G. BANKS, etc., et.al.,

Defendant/Appellant
and cross-Appellee

CROSS APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
THE HONORABLE SHERMAN A. CHRISTENSEN,
JUDGE

BRIEF OF CROSS-APPELLANT THE GNOLAUM UNITRUST

Attorney for The Gnolaum Unitrust , Cross-Appellant:

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(801) 264 8040

STATEMENT OF ISSUES

1. Did the trial court err in determining that the defendants as Gnolaum's joint venture partners did not breach their fiduciary duty to Gnolaum by holding that the sublease working interests of the Associates were not assessable for start-up production expenses beyond the proceeds of the development loan and in not awarding damages to Gnolaum against the defendants for undercapitalizing Gnolaum's mining business by not dealing candidly, openly and fairly with Gnolaum in good faith.

STATEMENT OF FACTS

Gnolaum Unitrust hereby adopts the Statement of Facts as set forth on pages 2 through 21 of the brief of cross-appellant Cascade Energy and Metals Corporation and the Statement of Facts as set forth on pages 1 through 9 of cross-appellant Telegraph Mine Limited as well as Rex Montis and incorporates the same herein by this reference.

The Gnolaum Unitrust ("Gnolaum") was organized in Utah on April 21, 1971. David and Vicki Weston are Primary Beneficiaries and their eight children are secondary beneficiaries. Each of the beneficiaries own Unitrust certificates as a result of individual cash and property contributions. Mr. Weston owns 21.7% of the trust and the balance is owned by Vicki Weston and their children. James F. Peters is the Trustee. Mr. Peters is also a director of Cascade and Rex Montis. The Gnolaum Unitrust controls 32.85% of Cascade a public company; 14.27% of Rex Montis (Utah) formed in 1969 out of Rex Montis (California) wherein Harmatz, Hodowski, Waugh, Stoltenberg and Donahey were principal shareholders (Trial Transcript ("TT") page 2102-3); and 77% of Interphase Corporation organized in 1965 (Utah) with 17 shareholders.

Telegraph Mine Limited was organized in 1976 and Gnolaum owns 30 units (10%), Interphase owns 35 units (11.66%), Weston owns 16.7 units (6%), Rex Montis owns 25 units (8.3%) and Cascade is the General Partner. In 1980 Gnolaum gifted 30 units and Weston gifted 10 units to the LDS Church. Weston, Harmatz, Hodowski and Waugh were involved in various purchases of Telegraph Mine lease interests such that in September of 1980 the Prime Lease was owned by the Telegraph Mine Joint Venture ("TJV") comprised of Telegraph Mine Ltd 60%, Rex Montis 30% and Gold Technics Ltd. (California) 10%. Weston, Harmatz and Hodowski governed the TJV and initiated, formulated, planned and approved the Telegraph Mine Associates sub-

lease project ("Memorandum" Ex.1; TT.1220: Williams deposition ("WD") pp. 92,106).

Harmatz and Hodowski introducing Weston to Williams, an attorney who had created at least 7 other mining ventures like Telegraph Mine Associates (WD.pp.43,47,64, 91, 92). Gnolaum in December of 1980 reacquired an interest in the Mine by purchasing a 1/35 Sublease working interest and paid a Minimum Annual Royalty ("MAR") of $74,285 in 1980 and 1981 with $30,000 cash ($60,000) and executing two $44,285 recourse notes ($88,570).

Harmatz and Hodowski C.P.A's as co-promoters sold their clients (WD.p.110) and along with Waugh and Stoltenberg received commissions and served as advisors and decision makers for their client Associates.

The purchasers ("Associates") including Gnolaum associated themselves as joint venture partners (WD.pp. 104-5) by the terms of page 1 and sections 5, 13, 15, 19, 23 and 24 of the Joint Operating Agreement ("JOA" (Ex.1D) and page 1 and sections 2, 8, 10 of a later Management Committee Agreement (Ex., to capitalize and conduct their mining business. Accordingly, Gnolaum relied on it's joint venture partners to 1) obligate themselves for $800,000 loan for development expenses (Ex.1D,2(h),4); and (2) to pro rate the costs of production to the point where income would exceed expenses (Ex.1D,13(b); (3) govern themselves by the decisions of a majority-in-interest (Ex.1D,15); and (4) hire a contractor to develop the mine and conduct the day-to-day operations on a "best efforts" basis (Ex.1D,4 & 13,8,11). The Associates majority would direct the contractor and adjust their individual business accounting records maintained by the Contractor in their behalf. Each Associate had a fiduciary duty to the others to deal openly and fully disclose all material information regarding the mine project (TT.768; Ex.1D,15,24).

The contract documents provided that a majority could fire the contractor and rehire another to manage the mine (Finding ("F")48). The contractor was not hired for a "fixed fee," but, performed it's ministerial functions using it's "best efforts" (F.93) and billing the Associates pro rata for it's costs according to a Chargeable Cost Procedure adopted by a majority (Ex.40.01). The Associates contracted with Cascade ("Contractor") to perform the ministerial duties of operating manager (Ex.1D,2).

Gnolaum, became an Associate to make a profit and expected to tax deduct the MAR and operating expenses to reduce the risks inherent in a start-up mining operation. Gnolaum looked to it's joint venture partners to share the costs necessary to produce a positive cash flow so it's business would not be undercapitalized as it's limited resources were not sufficient (TT.121; 769; 1108-11; 1393).

Gnolaum was provided a tax opinion and pro forma projection setting forth the requirements for the tax deductions (Ex.1H). Initially production was to be derived from a proposed underground mining plan to begin in October of 1981. A majority in July 1981 authorized a complete change in the mining plan to consist of an interim "scalping operation," mining the vein surface and recovering gold by "heap leaching," to be followed by underground mining (TT.447; 621; 682; 750-51; 954; 981; F.42).

On September 24th of 1981, Waugh, Stoltenberg and Hodowski formed a 1st management committee ("committee defendants"). Thereafter, the committee defendants took control and spent Gnolaum's development loan funds until depleted in March of 1982; approved the contractor's work orders, budgets and accounting in each month (TT.116-20; 493; 1045-47). In late March of 1982 the committee defendants received a final accounting of the development fund expenditure from Cascade (Ex.86; TT.137-33; 156-59). Production started using significantly

different methods than was proposed in 1980. Cascade gave the committee defendants and Associates notice it would thereafter bill the Associates for production costs in each quarter (TT.135). The committee, without notifying or reporting to Gnolaum terminated the committee and made a final inspection of the mine in May 1982 (TT.159-61). Following their inspection the committee knew there was not sufficient ore produced at that time to provide a positive cash flow (Ex.88;TT.138).

Thereafter, on July 29th 1982, Associates Waugh, Harmatz, Hodowski, Ashley, Bentz and Smith made an audit review and passed upon the contractors accounting which supported the amounts then assessed for production costs (TT.173-77). These Associates directed Cascade to convene an Associates meeting (Ex.93A.) to explain the need for further production assessments (TT.165-72) and to allow Waugh and Hodowski to organize a new management committee to govern Gnolaum's mining interests (TT.183-86). The 2nd committee was composed of Associate defendants Waugh, Hodowski, Stoltenberg (secretary), Ashley (vice chairman) and Associates Bentz (Chairman), Smith and Green with defendant Harmatz acting as an alternate (Ex.93A, pp. 55-56). A new agreement called "Resolution Management Committee Agreement" (Ex.98) was adopted by a majority (TT.143). This agreement gave committee defendants express authority to direct the operator to pro rate the operating costs among the Associates (Ex.98.pg.1,par.2,3,8,10). At all times Gnolaum relied on the committee defendants to protect it's mining business interests (Ex.1D.par.15).

Gnolaum paid all of it's pro rata share of the mine's production costs amounting to $25,389. The committee defendants at all times acted like and ofttimes stated they were going to pay their production costs. The committee defendants never gave Gnolaum notice they did not intend

to pay these costs (TT.177-82), or an accounting of their fiduciary management of Gnolaum's mining business through November of 1982 (TT.1109).

When Gnolaum and others attempted to divide the property to protect their interests in December of 1982, Stoltenberg threatened them (F.65) and in March of 1983 the committee defendants obtained an injunction (Ex.910; TT.428-29; 1112-13; 2719-22), encumbering Gnolaum's interest (Ex.1D.15) stopping any hope of achieving a profit from it'sinvestment. Gnolaum first participated in an action brought by Associate Plaintiffs' against the defendants in the Utah State Courts Bentz v. Stoltenberg, No. C83-2189. Gnolaum entered this dispute on April 16, 1984 when the defendants named Gnolaum as a party.Thereafter Gnolaum filed it's cross claim against the defendants alleging Breach of Contract, Breach of Partnership Duty, Breach of Fiduciary Duty, Fraud and Tortious Interference with Business Relationships against Harmatz, Hodowski, Waugh and Stoltenberg. The trial court, though it recognized the claims (F.15) substantially ignored Gnolaum's claims and addressed them in only two conclusory findings and therein dismissed such claims in total (F.110;F.128;Conc.Law.9; TT.1082-87).

1. Did the trial court err in determining that the defendants as Gnolaum's joint venture partners did not breach their fiduciary duty to Gnolaum by holding that the sublease working interests of the Associates were not assessable for start-up production expenses beyond the proceeds of the development loan and in not awarding damages to Gnolaum against the defendants for undercapitalizing Gnolaum's mining business by not dealing candidly, openly and fairly with Gnolaum in good faith.

STANDARD OF REVIEW: The trial court's findings shall

be set aside if not supported by substantial evidence and found to be clearly erroneous. Fed. R. Civ. Proc., Rule 52(a). Federal Security Insurance Company v. Smith, 259 F.2d 294.

The trial court erred in ignoring the claims of Gnolaum as each defendant had a contractual and fiduciary duty to support the mine project. But, in not paying the production costs the defendants breached the contract documents and their fiduciary duty as joint venturers by undercapitalizing Gnolaum's mining business, jeopardizing it's profit potential and tax basis (TT.1123; Ex.1D.pg 1, par.9,10,13,15,24; Ex.98. par. 2,5,7,8,10).

Gnolaum fulfilled it's obligations to it's joint venture partners by contributing all it's share of the production costs. The defendants observed, benefited from and encouraged Gnolaum's payments for over a period of nine months. The trial court erred in not applying the equitable doctrine "equality of burden as to a common right is equity" which provides:

> "that where two or more parties have assumed in company with each other, the whole of a liability, and one of the parties has paid the whole he has a right to recover from the others their pro rata share of the amount so paid by him. His right to receive and their duty to pay such share are comprehended with the term "contribution" This is an equitable right growing out of the relation of the parties and the law attaches a duty and implies the promise to contribute." Funiak, Handbook of Modern Equity, (2d. ed. 1956), Prentice Hall pp.237-238.

That Cascade and Gnolaum knew the contracts were assessable and that such interpretation was not unreasonable is set forth in Cascade's appeal brief on pages 21

through 40, which is incorporated herein by this reference. Gnolaum also adopts the arguments of Telegraph Mine Limited's appeal brief regarding the error of the trial court in misapplying some standards of equitable jurisdiction while ignoring other applicable equitable principles and the assessability of the contract documents as set forth on pages 9 through 14 and incorporated herein by this reference.

The trial court erred with regard to it's findings No. 28, 57, 59, 60, 67, 80, 101, III-C, 103, 109, 118, Conclusion of Law No. 6 & 7 and Accounting Finding 34 by not finding that Gnolaum reasonably interpreted the contract documents to require pro rata assessability for shortfalls from production as a condition for it's investment in the project in view of the risks. Gnolaum reasonably relied on the Associates mutual liability and later the committee defendants (WD.111) to assure that it's mining business would not be undercapitalized, encumbered or impaired (TT.1113, Ex.194; TT.1119; WD.112). The court erred in arriving at it's conclusions by not recognizing that the Associates, not Cascade, were the principal parties to the JOA (Ex.1D, pg.1) defining the partners working relationship and liabilities each would assume in support of the other to assure the mutual success of the project. The Associates hired Cascade to administer the affairs of the Associates and served only a ministerial function at the behest of the Associates as Cascade role in this capacity could be terminated and replaced as evidenced by the committee defendants intent in September of 1981. Cascade, according to it's Chargeable Cost Procedure (Ex.40.01) performed it's obligations to Gnolaum in invoicing to cover the costs required to bring about a positive cash flow only where the value of the ore mined and ore in process exceeded such costs (Ex.1D,par.10(c) & NR. 289 Ex.A).

The court erred in apparently adopting the statements of non-assessability made by Stoltenberg as evidenced by a letter the court quoted from Stoltenberg to Hodowski's clients dated Dec. 10, 1982 (Ex.131.08; F.64-65). This letter was written after the committee defendants believed and acted for over a period of nine months ending December 2, 1982 (F.63) as if the contract documents provided for assessability. Prior to sending the letter these defendants stated to Bentz, Green (TT.1136) and Weston (TT.297,300,302-3) that they would pay such assessments which caused Gnolaum to also so believe (Ex.131.04; F.62). Harmatz and Hodowski then paid, but stopped payment on their check. Stoltenberg asked Cascade to submit to him a note for his production costs in accordance with a 2nd Committee directive he drafted in October 1982, requiring an 18% interest charge on unpaid assessments (Ex.120). Thereafter, Stoltenberg failed to return the note (TT.298-99).

The committee defendants excused their bad faith conduct in a December 10th letter to Associates (F.65) by quoting Williams:

> "he intentionally included the non-assessment provisions for the protection of the Associates, as he has done in other mining venture agreements he has drafted"

It is apparent that Williams had forgotten on December 1, 1982 that of the 7 JOA he had prepared all were identical with the exception of the Associates JOA which was prepared at the direction of Cascade acting for the TJV executive committee (TT.1034; WD.51-55,58-59,111).

It is well understood in the construction and mining industry that construction and development contracts are either "fixed" contracts requiring the contractor to be at risk

for all funds required to bring a project to completion, or "best efforts" contracts wherein the contractor is hired on a cost plus basis and the liability for completion of the project is that of the owner. That the quoted statement attributed to Williams is clearly in error with regards to the Associates JOA are the "best efforts" terms of the agreement:

> "Development Expenses: ...the Operating Manager has agreed to perform the tasks necessary to develop the property, on a best efforts...to get the property into production, there can be no assurance that additional funds will not be required."(Ex.1.pg.12)(Emphasis added)

> "1. Authority of the Operating Manager: ...The Operating Manager shall perform such duties for the account of, and for and on behalf of, the purchasers, using its best efforts in so doing..." (Ex.1D,par.1)(Emphasis added)

> "4. Duty of Operating Manager to Develop the Property. The Operating Manager hereby agrees to perform such duties, using its best efforts, skill and judgement to make all installations necessary to place the property in a condition to produce therefrom. ...the operating manager, however, does not guarantee results."(Ex.1D,par.4)(Emphasis added)

which are considerably different from the "fixed fee" terms of William's 6 other JOA agreements (WD.110).

> "Development Expenses: Pursuant to the Joint Operating Agreement, the Operating Managers have agreed to perform the task necessary to develop the property... The Operating Managers will be compensated by a fixed fee... They will be

liable for any costs...in excess of the fixed fee." (Ex.614,615,616)(Emphasis added)

"3. Duty of Operating Manager to Develop the Property. The Operating Managers hereby agree to perform all tasks necessary to place the property in a condition to produce ore for a fixed fee..." (Ex.614,615,616)(Emphasis added)

Clearly it was intended in the Telegraph JOA that the Associates were liable for shortfalls in production and not Cascade who had no liability. Both the criteria for adequate business capitalization and economic feasibility as required by the IRS are met in the Associates JOA as well as William's JOA, but the later through the contractors fixed contract and the former by virtue of the Associates mutual liability up to the value of the ore produced (TT.420). The defendants knew that meeting this criteria was a critical and integral part of the success of Gnolaum's mining business investment. Yet, the committee defendants failed to notify Gnolaum of their intent to not pay the production costs and refused to invoke arbitration as required by the JOA to settle the dispute when it arose (Ex.1D,par.24).They knew time was of the essence and arbitration as provided was appropriate. As a result of the bad faith conduct of the committee defendants, Gnolaum is now required to pay additional and therefore excessive, start up production costs to protect the capital it has invested (Ex.898;914;117 TT.2713-18). ....

Dated April 16, 1987 Respectfully Submitted

Delwin T. Pond, Attorney for
the Gnolaum Unitrust

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

EXERPTS FROM TRIAL EXHIBITS 128, 129 WESTON'S "CONSTANCY AMID CHANGE" MEMORANDUM DATED DECEMBER 14, 1982, INTERPRETING ASSESSABILITY PROVISIONS OF JOINT OPERATING AGREEMENT

(Letter)

Cascade Energy and Metals Corporation
6101 South 900 East
Salt Lake City, Utah 84121
Telephone (801) 263 3610

December 14, 1982

Coastal Computers Investments
896 Monterey
San Luis Obispo, California 93401

Re: Letter of November 29, 1982
Interpretation of Contract Provisions
"Constancy Amid Change"

Dear Larry and Ron:

There have been many conflicting voices that have attempted to disrupt and redirect the Telegraph Mine program ... To whom does one listen? May I suggest that our objective as the Operating Manager is singular and CONSTANT, that is, to pursue the program at the Telegraph Mine as set forth in the Confidential Memorandum along a straight and narrow track leading to sustained production.

...To provide constancy and order to the present confusion, I am setting forth in an attachment to this letter, the meaning and intent of the memorandum and operating agreement as that applies to the payment of production expenses. I originally rewrote and approved of the language and the intent of these controlling documents.

The changing issue before us now is whether or not the Associates owe the start-up production and continuing production costs accumulating since March of 1982. In addition, whether some of the Associates, through directing the non-payment of production funds, have encumbered the investments and rights of other Associates.

Several Associates have addressed the heart of the problem with the very simple logic that states: without production, there is no program....

Therefore, I have set forth in the attached document (opinion letter) the interpretation of the original intent of the program documents, that you might come to your own conclusion as to where you stand in your relationship to the financial commitments you have made to the program...

Kindest regards,

CASCADE ENERGY AND METALS CORPORATION

W. David Weston
President

(Weston's Opinion Letter)

December 14, 1982
CONSTANCY AMID CHANGE
"An interpretative opinion"

STATEMENT OF FACT

The purpose of the Telegraph Associates mining program: Production is the basic intent and single purpose of the Telegraph Associates mining program.

Without production, the program is defeated, and the Associates investment is lost. Without production, the tax shelter is also defeated. Without production the sublessors will receive no earned royalty.

In order to arrive at a state of production, there is of necessity a development and construction period that is also referred to as pre-production. This period was funded to organize the facilities and prepare the physical plant for the commencement of production.

Following development there is a period known as start-up production which is a part of the production process and during which period the Associates assume almost unlimited liability because of the attendant risks required in paying start-up production expenses. Thereafter production in place where the program produces at a rate and in an amount sufficient to pay the costs of production and produce a profit culminates the program. On page 20 under title of risk factors it states:

> "...the extraction of minerals ... is the purpose of owning the working interests."

DEVELOPMENT AND PRODUCTION AS TWO SEPARATE AND DISTINCT PHASES WITH DISTINCT PROVISIONS FOR FUNDING.

The Telegraph mine documents ...speak of Development (pre-production) and Production as two separate and distinct phases, identified as follows:

I. Development - to engage in development of the property funded with $800,000, ...for which the Operating Manager was specifically instructed as to expenditure ...and for which he was to receive a construction management fee. This phase is also called pre-production which means, "before", "prior to" or "in advance of" production.

II. Production - to engage in production by removing the minerals in the property, this phase of the program was unfunded in the beginning, the costs of which carry an unlimited liability to each Associate ...

A. The production phase, is further divided into two subcategories, (i) start-up production, the costs for which are to be reimbursed from future excess cash flow - the risks associated with the costs for which are an unknown. (ii) cash flow production.

B. Start-up production costs in the mining industry are subject to many variables and were left open-ended in the Telegraph program with the anticipation that cash-flow recovery would occur rapidly enough to offset early cash-flow arrearage (start-up production costs deficits). Because of the risk and uncertainty in start-up production, the program and Operating Management Agreement speaks to the "best efforts" of the Operator. Full production is funded out of cash flow from the sale of product or the program is not economically viable.

In the following references to the $800,000 loan, which was specifically not to be used for production, the absence of the word "production"... is conspicuous, and all

references are to "development" which word is highlighted by the addition of the word "construction".

> "... the loan of $800,000 made by the Sublessors on behalf of the program for the development expenses. (page 2 "Terms of Offering" Summary Sheet)
>
> "... the Sublessors intend to lend, for the development of the property ...$800,000 to cover pre-production costs" (i.e. before production - see page 2)

The Operating Manager was to receive 2% of the $800,000, which was called a "construction fee"

> "...in the amount of 2% of the actual pre-production expenses as a development/construction management fee" (see page 3 "compensation summary sheet").
>
> "The Operating Manager has agreed to perform the task necessary to develop the property... The Operating Manager will be compensated for its expenses up to and including the sum of $800,000 ...which will include a construction management fee of 2%.

These development expenses could be identified and thus were budgeted.

> "The Operating Manager believes that $800,000 is the maximum which will be required ...for the initial development work." (see page 12)

In summary the $800,000 was not available for start-up production expenses.

PRODUCTION COSTS WERE SPECIFICALLY TO BE PAID BY THE ASSOCIATES AS AND WHEN CALLED FOR AS A REIMBURSEMENT OF THE OPERATOR'S EXPENSES.

The possibility of an additional call for funds for start-up production should have been anticipated by the Associates. Under the risk section of the Confidential Memorandum the Associates were put on notice.

> "To get the property into production, there can be no assurance that additional funds will not be required." (See page 12)

Required for what? For start-up production...

The Joint Operating Agreement is specific in describing the dual concept of initially funded development, and production to be funded as and when required, and which production, at least in the start-up phase, carried an unlimited liability for the Associates. The description of the Joint Operating Agreement (See page 50 of the Memorandum), provides (1) development has a funded amount of $800,000; and (2) production is not initially funded and carries an unlimited liability to the extent that purchasers (Associates) may halt production and its expenses. The description states:

> "DEVELOPMENT OF PROPERTY. The Operating Manager will ...develop the mine to the point that it may be placed into production. ...The Operating Manager will receive a construction management fee of 2% up to the sum of $800,000.
>
> "MINING OF PROPERTY. Each purchaser ...may have minerals delivered to him ...subject to

paying any of the expenses which may occur in ...producing said minerals."

JOINT OPERATING AGREEMENT PROVIDES:

In the Joint Operating Agreement the second Whereas clause, a preamble of the program re-states that in separate and distinct parts the program will:

1. "Be engaged in the development of the property," and

2. "...the production of gold and silver ...from the property."

The third Whereas clause provides for the pre-production costs of development to be funded by $800,000. This clause is limited by Article 2(d) which limits the Operator from expending these funds for other than development costs.

It is clear that these two phases are separate and these funds were not to be used for production.

Article 2(d) cited above and Article 4 thereof beg the question particularly were the duties and requirements of development as set forth in Article 4 through expenditures of funded development do not mention mining costs, which wording is again conspicuously absent - where do the funds come from for start-up production? The most critical step of the production phase.

UNDER THE OPERATING AGREEMENT THE ASSOCIATES HAVE UNLIMITED LIABILITY TO PAY FOR PRODUCTION EXPENSES WITH TWO MODIFYING EXCEPTIONS

To provide for harmonious construction of the Joint Operating Agreement and program documents in regard to the liability to pay production expenses, under Risk Factors

page 23 of the Confidential Memorandum it states under the heading PURCHASERS UNLIMITED PERSONAL LIABILITY:

> "...each purchaser is subject to unlimited liability over and above his investment." (i.e. money paid on royalty payments and the $800,000 development loan)" for ...matters which might occur as a result of the ...start-up production et al) operations under the joint operating agreement."

The above section is specific that under the joint operating agreement each Purchaser has unlimited liability for production expenses because production is the pure purpose of the agreement. ...

WHAT ARE THE EXCEPTIONS TO THE ASSOCIATES UNLIMITED LIABILITY FOR PRODUCTION EXPENSES.

Exception 1. The obvious method is for the Associates to direct the Operator to stop mining (production) operations. The Operator can only elect this option (stop production) when it is determined that the program is not economically viable (i.e. it costs more to produce the commodities than they can be sold for).

This alternative is addressed in "Risk Factors" section of the Confidential Memorandum page 21 as follows:

> "The purchasers may be unable to meet all their obligations and may determine to stop mining operations. In such event each purchaser runs the risk that because of his inability to pay his fixed obligations on his note, he may forfeit his working interest in the property. If such event did occur the purchaser would lose his entire investment and might suffer a taxable gain."

This section of risk disclosure also amply provides a statement as to why the Operator would only engage in start-up production on a best-efforts (without personal liability for start-up production costs) basis.

> "Mining as a business is highly speculative because of the many obstacles which may be encountered in mining, which may cause delays or require additional working capital ... Therefore, the purchasers may not realize their projected projections ...or cash flow."

Exception 2. To provide a mechanism to establish that mining production was economical, as carried out by the Operator, the Joint Operating Agreement in Article 13(c) provided:

> 'The Operating Manager shall have no authority, express or implied, to ...subject the purchasers ...to any liability in excess of the Purchasers respective interests in the minerals mined, milled and removed from the property and their interests in any proceeds from the sale of said minerals." (note the absence of the word "sold" i.e. mined, milled and sold).

This statement restricts the Operator during production from producing ore which, following production, will not, from the minerals when (future) sold recover the costs of production.

Let me illustrate this point from the current instance. As of the end of June (the 2nd quarter billing), there was represented to be produced, as taken from the production records, a total of 4,743.90 tr/oz of gold which had been mined, milled and/or removed from the property (i.e. avail-

able for extraction). The then available interest from the sale of said minerals following leach extraction would be approximately $1,252,389. The liability to which the purchasers were subject was the operating expenses to that date of approximately $322,000. Thus, the purchasers were not subject to a liability in excess of the Purchasers (Associates) respective (economic) interest in the minerals.

If on the other hand, the minerals mined, in which the purchaser had an interest had a respective value for example of $150,000 then the liability of the Associates to the Operating Manager could not exceed $150,000 and the Operator would have had to take a loss of $182,000 because of the poor judgment exercised in mining ore at a greater cost that the ore was worth.

Clause 13(c) protects the purchaser (associate) by assuring a value in the ore produced equal to or greater than the cost liability he is exposed to in producing the ore. This is especially important during the start-up production period where production expenses increase faster than the physical ability to remove and sell the gold produced. This is why the clause states "mined, milled," (and available for extraction), and not "mined, milled," (and sold). ....

ARTICLE 10 PROVIDES FOR PRODUCTION EXPENSE LIABILITY AND REIMBURSEMENT

As the program sets apart the pre-production development/construction phase from production so as to treat them as two separate programs, so does the operating agreement set apart the respective charges and compensation for these two separate and distinct segments of the program. This is accomplished in Article 4 and Article 10 respectively.

Article 4 provides not only for the duties of the Operating Manager during the development period, but also supports the chargeable cost base of the Operator

during this period by providing for the itemized basis of charges including office support and general administration. Therefore, Article 10, not to be redundant, deals with compensation of Operator during the production phase. The language of Article 10, subparagraph (b) speaks of compensation in full of 5%, which is compensation for production. Compensation in part (full is the sum of all its parts) is then set forth in subparagraph (a). Therefore (b) is a compliment to (a) and thus (a) speaks of production charges. Even subparagraph (c) to be consistent speaks only of compensation from production. The 2% management fee mentioned therein is to be received from production. It is interesting to note that Article 4 does not mention the 2% construction management fee. Why? Because it would be inappropriate as it is to be paid out of production expenses - Article 10.

Where else in the entire document is there a provision for the costs to cover the very purpose of the agreement - production, no where else but in Article 10.

. . . .

Prepared by
W. David Weston

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

EXERPTS FROM "PUBLIC LAND AND MINING LAW" TEXT AND CASES BY LOREN L. MALL J.D., THIRD EDITION, BUTTERWORTH (LEGAL PUBLISHERS) INC.

"**(c) Development of Mineral Deposits.** Exploration work continues until general knowledge has been obtained of the shape, size, general geological characteristics, and average depth and grade of an ore deposit or oil and gas formation. Thereafter, a decision may be made to study the technical and economic feasibility of producing the deposit. All the steps after exploitation and before production of minerals which are taken to block out, or define, the mineral deposit and to open a mine or oil and gas field are properly known as development or exploitation work.

Extraction and processing require varying amounts of investment. For coal, substantial investment may be

needed for a mine, but little processing is required other than crushing and occasionally some mixing of various types. For oil and gas deposits, the production equipment includes pumps, field pipelines, and additional wells as well as such heavily capital intensive operations as regional pipelines and refineries. Additional expensive secondary or tertiary field recovery methods may also be warranted. Once an oil and gas hole is drilled for exploration, however, it may also serve as the ultimate access means for withdrawing production.

For hardrock deposits, substantial investment is usually required for both extraction and processing. Ore may consist of 99 percent waste minerals by weight. In addition, it may be necessary to remove many times more waste rock than there is ore. Waste rock may be valueless either because it is insufficiently mineralized or contains exotic ore minerals which cannot be processed with the bulk of the ore. Both the waste minerals and the waste rock from the ore must be disposed of in acceptable fashion. Then, once the ore mineral is concentrated, it must usually undergo additional processing in order to isolate the actual useful element sought.

Production of mineral may be by any one of the several general mining methods. These include surface mining, underground mining, and in situ(in place) mining by either solution leaching or retort processes.

There are several surface mining techniques. Open pit mining is more complex than simply digging a hole in the ground, placing the overburden aside, and exposing an ore body below the surface which is then produced. The grade and tonnage of the ore determine how much waste rock can be economically stripped, removed, and usually replaced after the ore is extracted. The extent of the pit depends more often on the costs of removing the overburden than on a sudden change from mineral to nonmineral material."

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT OF W. DAVID WESTON AND EXHIBIT OF GOLD PRODUCTION A PART OF REHEARING BRIEF OF CROSS APPELLANT W. DAVID WESTON AS SUBMITTED TO TENTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
CASES NO. 86-1156, NO, 86-1157, NO 86-1202

CASCADE ENERGY AND METALS CORPORATION
a Nevada corporation

Plaintiff and Respondent,

vs.

JEFFERY G. BANKS, etc. et. al.,

Appellants and Defendants

CROSS APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

AFFIDAVIT OF W. DAVID WESTON AND EXHIBIT OF REHEARING BRIEF OF CROSS APPELLANT W. DAVID WESTON

W. DAVID WESTON
Pro Se
3572 Doverhill Drive
Salt Lake City, Utah

STATE OF UTAH)
ss.
County of Salt Lake)

I. W. David Weston, being first duly sworn, do hereby depose and state as follows:

1. That attached hereto is an exhibit that was prepared under my supervision entitled "Ore Loading Report - Telegraph Mine Heap Leach Pad." The purpose of the Exhibit is to illustrate that the recoverable accumulated gold on the leach pad in each quarter commencing March 1982, exceeded the quarterly production assessments made to working interest owners. Further, that gold was produced

and sold in addition to the souvenir bars of gold that were distributed to the Associates out of the first production.

2. That all items on the exhibit were introduced into the trial court as evidence and are before the Appeals Court as evidence.

3. That column one (1) of the exhibit entitled "Truck Load #'s" denotes the trip number of each truck loaded with crushed ore (-1/4"), cement and cyanide (for agglomeration) made in transferring ore to the leach pile on the date in column one. At the leach pile site the unloading and stacking operator recorded each truck load and the location of the leach pad where it was stacked on an Ore Loading Summary Report. See Exh. 837, 903 and Trial Transcript 2013 through 2017.

4. That column four (4) of the exhibit entitled "Assay" identifies the average assay value of the volume of ore set out in column two (2) entitled "Load-In Tons." As each truck was loaded a representative sample of the ore being loaded was taken. Following a days operation these samples were blended for approximately 100 tons and a single representative sample sent for assaying. See Exh. 903, 823, 907, Trial Transcript pgs. 2652-2653,2657.

5. That column five (5) of the exhibit "Oz Au/Load" sets forth the number of ounces of gold in the ore delivered by the respective truck number which was then stacked on the leach pad.

6. That column eleven (11) of the exhibit entitled "Recoverable (72%) Gold Value" is the gold that is recoverable from leaching over time (See Exh. 261) less any amounts which were actually recovered (Column seven (7) "Gold Sales Ounces"). See Exh. 889 and trial transcript pg. 2493.

7. That column twelve (12) entitled "Quarterly Production Assessments" is the total amount assessed all working interest holders for production costs in the prior

quarter (i.e. expenses to prepare the ore for removal to the leach pad and the leaching expenses etc.) See Exh. 86, 90, 109, 110, 97, 95.

8. That also attached are true copies of Trial Exh. 95, 109 and 110 which also illustrate in the three right hand columns the number of tons of ore loaded to the pad, the average grade of the ore and the ounces available for extraction from the ore loaded.

Dated this 22nd day of March 1990.

David Weston

Subscribed to and sworn before me this 22nd day of March 1990.

Notary Public residing in
Salt Lake County, Utah

ORE LOADING SUMMARY REPORT....
TELEGRAPH MINE HEAP LEACH PAD.

#	DATE	(1) TRUCK LOAD #'S	(2) LOAD-IN TONS	(3) CUMULATIVE TONS	(4) ASSAY	(5) OZ AU/ LOAD	(6) CUMULATIVE OUNCES AU	(7) GOLD SALES: OUNCES	(8) CUMUL SALES: OUNCES	(9) GOLD SPOT $/OZ	(10) GOLD SALES: $ AMT RCVD	(11) RECOVERABLE (72%) GOLD VALUE ($)	(12) QUARTERLY PRODUCTION ASSESS.($)
1	3/18/82	1-12	120.00	120.00	.355	42.60	42.60						
2	3/19/82	13-17	50.00	170.00	.100	5.00	47.60						
3	3/22/82	18-23	60.00	230.00	.150	9.00	56.60						
4	3/23/82	24-35	120.00	350.00	.150	18.00	74.60						
5	3/24/82	36-48	130.00	480.00	.160	20.80	95.40						
6	3/25/82	49-53	50.00	530.00	.110	5.50	100.90						
7	3/26/82	54-60	76.00	606.00	.060	4.56	105.46						
8	3/29/82	61-75	153.50	759.50	.160	24.56	130.02						
9	3/31/82	76-91	170.00	929.50	.330	56.10	186.12						
10	3/31/82	92-101	108.00	1037.50	.120	12.96	199.08						
11	3/31/82	102-111	108.00	1145.50	.100	10.80	209.88						24495.80
MARCH	TOTALS		1145.50	1145.50	.183	209.88	209.88	.00	.00	363.73	.00	54964.55	24495.80
12	4/1/82	112-121	112.20	1257.70	.180	20.20	230.08						
13	4/2/82	122-132	130.00	1387.70	.170	22.10	252.18						
14	4/2/82	133-142	130.00	1517.70	.240	31.20	283.38						
15	4/5/82	143-158	176.00	1693.70	.060	10.56	293.94						
16	4/6/82	159-175	187.00	1880.70	.580	108.46	402.40						

17	4/7/82	176-197	242.00	2122.70	.630	152.46	554.86						
18	4/8/82	198-222	278.00	2400.70	.320	88.96	643.82						
19	4/9/82	223-238	176.00	2576.70	.300	52.80	696.62						
20		239-244	66.00	2642.70	.060	3.96	700.58						
21	4/13/82	245-255	121.00	2763.70	.360	43.56	744.14						
22	4/14/82	256-267	132.00	2895.70	.040	5.28	749.42						
23	4/15/82	268-285	198.00	3093.70	.080	15.84	765.26						
24	4/21/82	286-294	99.00	3192.70	.240	23.76	789.02						
25	4/22/82	295-301	77.00	3269.70	.410	31.57	820.59						
26		302-309	88.00	3357.70	.110	9.68	830.27						
27	4/26/82	310-317	88.00	3445.70	.400	35.20	865.47						
28	4/27/82	318-324	77.00	3522.70	.080	6.16	871.63						
29	4/27/82	325-331	77.00	3599.70	.200	15.40	887.03						
30	4/28/82	332-341	110.00	3709.70	.100	11.00	898.03						
31	4/28/82	342-355	154.00	3863.70	.500	77.00	975.03						
32	4/28/82	351-355	55.00	3918.70	.500	27.50	1002.53						
33	4/29/82	356-360	55.00	3973.70	.500	27.50	1030.03						
APRIL	TOTALS		2828.20	3973.70	.290	820.15	1030.03	.00	.00	312.00	.00	231385.04	.00
34	5/3/82	361-370	112.20	4085.90	.500	56.10	1086.13						
35	5/5/82	371-376	67.32	4153.22	.500	33.66	1119.79						
36	5/5/82	377-382	67.32	4220.54	.510	34.33	1154.12						
37	5/7/82	383-395	145.86	4366.40	.560	81.68	1235.80						
38	5/7/82	396-399	44.44	4410.84	.500	22.22	1258.02						
39	5/10/82	400-410	123.42	4534.26	.500	61.71	1319.73						

40	5/10/82	411-422	134.64	4668.90	.320	43.08	1362.82						
41	5/11/82	423-429	78.54	4747.44	.450	35.34	1398.16						
42	5/11/82	430-440	123.42	4870.86	.500	61.71	1459.87						
43	5/11/82	441-449	100.98	4971.84	.550	55.54	1515.41						
44	5/12/82	450-459	112.20	5084.04	.220	24.68	1540.09						
45	5/12/82	460-469	112.20	5196.24	.180	20.20	1560.29						
46	5/12/82	470-477	84.34	5280.58	.390	32.89	1593.18						
47	5/13/82	478-489	134.64	5415.22	.500	67.32	1660.50						

#	DATE	(1) TRUCK LOAD #'S	(2) LOAD-IN TONS	(3) CUMULATIVE TONS	(4) ASSAY	(5) OZ AU/ LOAD	(6) CUMULATIVE OUNCES AU	(7) GOLD SALES: OUNCES	(8) CUMU SALES: OUNCES	(9) GOLD SPOT $/OZ	(10) GOLD SALES: $ AMT RCVD	(11) RECOVERABLE (72%) GOLD VALUE ($)	(12) QUARTERLY PRODUCTION ASSESS.($)
48	5/13/82	490-499	112.20	5527.42	.340	38.15	1698.65						
49	5/13/82	500-509	123.42	5650.84	.330	40.73	1739.38						
50	5/13/82	510-514	56.10	5706.94	.240	13.46	1752.84						
51	5/14/82	515-519	56.10	5763.04	.240	13.46	1766.30						
52	5/14/82	520-529	112.20	5875.24	.280	31.42	1797.72						
53	5/14/82	530-548	213.18	6088.42	.180	38.37	1836.09						
54	5/17/82	549-578	336.60	6425.02	.180	60.59	1896.68						
55	5/18/82	578-587	112.20	6537.22	.780	87.52	1984.20						
56	5/18/82	588-599	134.64	6671.86	.830	111.75	2095.95						
57	5/18/82	600-607	89.76	6761.62	.210	18.85	2114.80						
58	5/19/82	608-609	22.44	6784.06	.330	7.41	2122.20						

59	5/19/82	610-619	112.20	6896.26	.230	25.81	2148.01						
60	5/19/82	620-637	201.96	7098.22	.210	42.41	2190.42						
61	5/20/82	638-639	22.44	7120.66	.210	4.71	2195.13						
62	5/20/82	640-649	112.20	7232.86	.240	26.93	2222.06						
63	5/20/82	650-659	112.20	7345.06	.320	35.90	2257.97						
64	5/20/82	660-669	112.20	7457.26	.140	15.71	2273.67						
65	5/20/82	670-677	89.76	7547.02	.220	19.75	2293.42						
66	5/21/82	678-687	112.20	7659.22	.770	86.39	2379.81						
67	5/21/82	688-697	112.20	7771.42	.290	32.54	2412.35						
68	5/21/82	698-707	112.20	7883.62	.410	46.00	2458.35						
69	5/21/82	708-717	112.20	7995.82	.500	56.10	2514.45						
70	5/24/82	720-726	80.50	8076.32	.300	24.15	2538.60						
71	5/24/82	727-734	92.00	8168.32	.760	69.92	2608.52						
72	5/25/82	735-743	100.98	8269.30	.470	47.46	2655.99						
73	5/25/82	744-752	100.98	8370.28	.060	6.06	2662.04						
74	5/26/82	753-760	89.76	8460.04	.410	36.80	2698.85						
75	5/26/82	761-767	78.54	8538.58	.360	28.27	2727.12						
76	5/27/82	768-777	112.20	8650.78	.140	15.71	2742.83						
77	5/27/82	778-787	112.20	8762.98	.230	25.81	2768.63						
78	5/27/82	788-796	100.98	8863.96	.490	49.48	2818.11						
79	5/28/82	797-804	89.76	8953.72	.280	25.13	2843.25						
80	5/28/82	805-814	112.20	9065.92	.300	33.66	2876.91						
81	5/28/82	815-823	100.98	9166.90	.190	19.19	2896.09						
MAY	TOTALS		5193.20	9166.90	.359	1866.07	2896.09	.00	.00	311.30	.00	649118.70	.00

82	6/1/82	824-833	112.20	9279.10	.300	33.66	2929.75						
83	6/1/82	834-843	112.20	9391.30	.090	10.10	2939.85						
84	6/1/82	844-851	89.76	9481.06	.350	31.42	2971.27						
85	6/2/82	852-859	89.76	9570.82	.180	16.16	2987.42						
86	6/2/82	860-868	100.98	9671.80	.180	18.18	3005.60						
87	6/3/82	869-876	89.76	9761.56	.080	7.18	3012.78						
88	6/3/82	877-884	89.76	9851.32	.220	19.75	3032.53						
89	6/3/82	885-892	89.76	9941.08	.420	37.70	3070.23						
90	6/7/82	893-901	100.98	10042.06	.340	34.33	3104.56						
91	6/7/82	902-910	100.98	10143.04	.500	50.49	3155.05						
92	6/7/82	911-918	89.76	10232.80	.450	40.39	3195.44						
93	6/8/82	919-929	123.42	10356.22	.170	20.98	3216.42						
94	6/16/82	930-949	224.40	10580.62	.065	14.59	3231.01						
95	6/17/82	950-959	112.20	10692.82	.200	22.44	3253.45						
96	6/17/82	960-969	112.20	10805.02	.050	5.61	3259.06						
97	6/17/82	970-977	89.76	10894.78	.050	4.49	3263.55						

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98	6/21/82	978-985	89.76	10984.54	.074	6.64	3270.19						
99	6/21/82	986-992	78.54	11063.08	.040	3.14	3273.33						
100	6/23/82	993-999	78.54	11141.62	.106	8.33	3281.66	93.75	93.75	304.00			

101	6/23/82	1000-1006	78.54	11220.16	.078	6.13	3287.78						
102	6/23/82	1007-1013	78.54	11298.70	.048	3.77	3291.55						
103	6/30/82	1014-1020	78.54	11377.24	.440	34.56	3326.11						
104	6/30/82	1021-1025	78.54	11455.78	.080	6.28	3332.39						
105	6/30/82	1026-1033	89.76	11545.54	.070	6.28	3338.68						297488.80
JUNE	TOTALS		2378.64	11545.54	.186	442.58	3338.68	93.75	93.75	304.00	.00	702269.65	297488.80
106	7/5/82	1034-1043	112.20	11657.74	.090	10.10	3348.78						
107	7/6/82	1044-1051	89.76	11747.50	.060	5.39	3354.16						
108	7/6/82	1052-1059	89.76	11837.26	.080	7.18	3361.34	2.41	96.16	313.50	24322.00		
109	7/8/82	1060-1066	78.54	11915.80	.080	6.28	3367.62	12.35	108.51	353.00	8920.00		
110	7/8/82	1067-1073	78.54	11994.34	.050	3.93	3371.55						
111	7/8/82	1074-1080	78.54	12072.88	.060	4.71	3376.26						
112	7/12/82	1081-1087	78.54	12151.42	.090	7.07	3383.33						
113	7/12/82	1088-1094	78.54	12229.96	.060	4.71	3388.05						
114	7/12/82	1095-1101	78.54	12308.50	.050	3.93	3391.97						
115	7/13/82	1102-1109	89.76	12398.26	.080	7.18	3399.15						
116	7/13/82	1110-1117	89.76	12488.02	.090	8.08	3407.23						
117	7/13/82	1118-1125	89.76	12577.78	.070	6.28	3413.51						
118	7/14/82	1126-1137	134.64	12712.42	.120	16.16	3429.67						
119	7/14/82	1138-1143	67.32	12779.74	.070	4.71	3434.38	11.80	120.31	347.50	4100.50	DISTRIBUTED.....	
120	7/15/82	1144-1152	100.98	12880.72	.090	9.09	3443.47						
121	7/16/82	1153-1158	67.32	12948.04	.210	14.14	3457.61						
122	7/16/82	1159-1164	67.32	13015.36	.110	7.41	3465.01						
123	7/16/82	1165-1171	78.54	13093.90	.090	7.07	3472.08						

124		1172-1187		13093.90		.00	3472.08	100.00	220.31	347.50			
125	7/20/82	1188-1193	67.32	13161.22	.070	4.71	3476.80						
126	7/20/82	1194-1199	67.32	13228.54	.110	7.41	3484.20						
127	7/20/82	1200-1206	78.54	13307.08	.080	6.28	3490.48						
128	7/21/82	1207-1213	78.54	13385.62	.080	6.28	3496.77						
129	7/21/82	1214-1220	78.54	13464.16	.030	2.36	3499.12						
130	7/21/82	1221-1227	78.54	13542.70	.040	3.14	3502.26						
JULY	TOTALS		1997.16	13542.70	.082	163.59	3502.26	126.56	220.31	453.83	37342.50	1044416.00	.00
131	8/2/82	1228-1234	78.54	13621.24	.100	7.85	3510.12						
132	8/2/82	1235-1241	78.54	13699.78	.040	3.14	3513.26						
133	8/3/82	1242-1249	89.76	13789.54	.150	13.46	3526.72						
134	8/3/82	1250-1257	89.76	13879.30	.140	12.57	3539.29						
135	8/3/82	1258-1265	89.76	13969.06	.170	15.26	3554.55						
136	8/3/82	1266-1273	89.76	14058.82	.170	15.26	3569.81						
137	8/3/82	1274-1281	89.76	14148.58	.280	25.13	3594.94						
138	8/4/82	1282-1287	67.32	14215.90	.110	7.41	3602.35						
139	8/4/82	1288-1293	67.32	14283.22	.120	8.08	3610.43	40.00	260.31	346.25			
140	8/4/82	1294-1300	78.54	14361.76	.070	5.50	3615.92						
141	8/5/82	1301-1307	78.54	14440.30	.070	5.50	3621.42						
142	8/5/82	1308-1314	78.54	14518.84	.050	3.93	3625.35						
143	8/5/82	1315-1322	89.76	14608.60	.100	8.98	3634.32						
144	8/6/82	1323-1342	224.40	14833.00	.030	6.73	3641.06	9.24	269.55	344.75	37531.00		
145	8/6/82	1343-1351	100.98	14933.98	.060	6.06	3647.11						
146	8/9/82	1352-1360	100.98	15034.96	.050	5.05	3652.16						
147	8/9/82	1361-1369	100.98	15135.94	.070	7.07	3659.23						

#	DATE	(1) TRUCK LOAD #'S	(2) LOAD-IN TONS	(3) CUMULATIVE TONS	(4) ASSAY	(5) OZ AU/ LOAD	(6) CUMULATIVE OUNCES AU	(7) GOLD SALES: OUNCES	(8) CUMUL SALES: OUNCES	(9) GOLD SPOT $/OZ	(10) GOLD SALES: $ AMT RCVD	(11) RECOVERABLE (72%) GOLD VALUE ($)	(12) QUARTERLY PRODUCTION ASSESS.($)
148	8/9/82	1370-1378	100.98	15236.92	.030	3.03	3662.26						
149	8/9/82	1379-1386	89.76	15326.68	.120	10.77	3673.03						
150	8/10/82	1387-1392	67.32	15394.00	.050	3.37	3676.40						
151	8/10/82	1393-1398	67.32	15461.32	.040	2.69	3679.09						
152	8/11/82	1399-1404	78.54	15539.86	.040	3.14	3682.23						
153	8/11/82	1405-1412	78.54	15618.40	.210	16.49	3698.73						
154	8/12/82	1413-1418	78.54	15696.94	.080	6.28	3705.01						
155	8/12/82	1419-1424	67.32	15764.26	.500	33.66	3738.67						
156	8/14/82	1424-1431	89.76	15854.02	.150	13.46	3752.13						
157	8/14/82	1432-1440	89.76	15943.78	.110	9.87	3762.01						
158	8/14/82	1441-1447	89.76	16033.54	.080	7.18	3769.19						
159	8/16/82	1448-1454	78.54	16112.08	.080	6.28	3775.47						
160	8/16/82	1455-1461	78.54	16190.62	.080	6.28	3781.75						
161	8/16/82	1462-1468	78.54	16269.16	.080	6.28	3788.04						
162	8/16/82	1469-1475	78.54	16347.70	.080	6.28	3794.32						
163	8/16/82	1476-1482	78.54	16426.24	.080	6.28	3800.60						
164	8/17/82	1483-1490	89.76	16516.00	.090	8.08	3808.68						
165	8/17/82	1491-1498	89.76	16605.76	.070	6.28	3814.97						
166	8/17/82	1499-1507	100.98	16706.74	.050	5.05	3820.02						
167	8/18/82	1508-1513	67.32	16774.06	.032	2.15	3822.17						

168	8/18/82	1514-1519	67.32	16841.38	.041	2.76	3824.93				
169	8/18/82	1520-1526	78.54	16919.92	.040	3.14	3828.07				
170	8/18/82	1527-1535	100.98	17020.90	.092	9.29	3837.36				
171	8/19/82	1536-1542	78.54	17099.44	.044	3.46	3840.82				
172	8/19/82	1543-1549	78.54	17177.98	.060	4.71	3845.53				
173	8/19/82	1550-1556	78.54	17256.52	.063	4.95	3850.48				
174	8/20/92	1557-1563	78.54	17335.06	.033	2.59	3853.07				
175	8/20/82	1564-1570	78.54	17413.60	.031	2.43	3855.50	35.00	304.55	386.50	
176	8/20/82	1571-1576	67.32	17480.92	.032	2.15	3857.66				
177	8/20/82	1577-1583	78.54	17559.46	.120	9.42	3867.08				
178	8/23/82	1584-1589	67.32	17626.78	.180	12.12	3879.20				
179	8/23/82	1590-1597	89.76	17716.54	.180	16.16	3895.36				
180	8/23/82	1598-1604	78.54	17795.08	.180	14.14	3909.49				
181	8/23/82	1605-1609	56.10	17851.18	.180	10.10	3919.59				
182	8/24/82	1610-1616	78.54	17929.72	.060	4.71	3924.31				
183	8/24/82	1617-1622	67.32	17997.04	.350	23.56	3947.87				
184	8/25/82	1623-1628	67.32	18064.36	.510	34.33	3982.20				
185	8/25/82	1629-1634	67.32	18131.68	.740	49.82	4032.02				
186	8/25/82	1635-1640	67.32	18199.00	.400	26.93	4058.95				
187	8/26/82	1641-1654	157.08	18356.08	.100	15.71	4074.65				
188	8/26/82	1655-1667	145.86	18501.94	.120	17.50	4092.16				
189	8/27/82	1668-1678	123.42	18625.36	.110	13.58	4105.73				
190	8/27/82	1679-1687	100.98	18726.34	.080	8.08	4113.81				
191	8/28/82	1688-1699	134.64	18860.98	.110	14.81	4128.62				
192	8/30/82	1700-1708	100.98	18961.96	.070	7.07	4135.69				
193	8/31/82	1709-1720	134.64	19096.60	.100	13.46	4149.15				

AU6	TOTALS	-	5553.90	19096.60	.116	646.89	4149.15	84.24	304.55			

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194	9/1/82	1721-1730	112.20	19208.80	.180	20.20	4169.35	34.00	338.55	405.25	.00		
195	9/1/82	1731-1740	112.20	19321.00	.180	20.20	4189.54						
196	9/2/82	1739-1760	246.84	19567.84	.040	9.87	4199.42						
197	9/2/82	1761-1773	145.86	19713.70	.050	7.29	4206.71						
198	9/6/82	1774-1783	112.20	19825.90	.060	6.73	4213.44	8.97	347.52	453.00	4205.00		
199	9/13/82	1784-1970		19825.90		.00	4213.44	3.73	351.25	439.00	11870.00		
200	9/17/82	1971-1978	88.00	19913.90	.720	63.36	4276.80	23.00	374.25	448.50			
201	9/18/82	1979-1989	121.00	20034.90	.120	14.52	4291.32	.07	374.32	387.50	10011.00		
202	9/20/82	1990-1995	66.00	20100.90	.080	5.28	4296.60	2.35	376.67	424.25	12188.00		
203	9/21/82	1996-2005	99.00	20199.90	.090	8.91	4305.51	3.13	379.80	424.25	12108.00		
204	2/829/2	2006-2015	80.00	20279.90	.050	4.00	4309.51						
205	9/22/82	2016-2025	80.00	20359.90	.070	5.60	4315.11						
206	9/22/82	2026-2027	20.00	20379.90	.050	1.00	4316.11						
207	9/23/82	2028-2035	80.00	20459.90	.050	4.00	4320.11						
208	9/23/82	2036-2050	120.00	20579.90	.060	7.20	4327.31						
209	9/24/82	2051-2059	72.00	20651.90	.180	12.96	4340.27						

210	9/24/82	2060-2070	88.00	20739.90	.180	15.84	4356.11						
211	9/24/82	2071-2072	16.00	20755.90	.180	2.88	4358.99						
212	9/24/82	2073-2079	56.00	20811.90	.330	18.48	4377.47						
213	9/25/82	2080-2089	80.00	20891.90	.180	14.40	4391.87						
214	9/25/82	2090-2099	80.00	20971.90	.120	9.60	4401.47						
215	9/25/82	3000-3003	32.00	21003.90	.120	3.84	4405.31						
216	9/27/82	3004-3113	80.00	21083.90	.500	40.00	4445.31						
217	9/27/82	3114-3123	80.00	21163.90	.230	18.40	4463.71						
218	9/28/82	3124-3133	80.00	21243.90	.180	14.40	4478.11						
219	9/28/82	3134-3143	80.00	21323.90	.180	14.40	4492.51						
220	9/28/82	3144-3145	16.00	21339.90	.060	.96	4493.47						
221	9/28/82	3146-3153	64.00	21403.90	.180	11.52	4504.99						
222	9/28/82	3154-3156	24.00	21427.90	.060	1.44	4506.43						
223	9/29/82	3157-3166	80.00	21507.90	.580	46.40	4552.83						
224	9/29/82	3167-3176	80.00	21587.90	.040	3.20	4556.03						
225	9/29/82	3177-3186	80.00	21667.90	.190	15.20	4571.23						
226	9/30/82	3187-3196	80.00	21747.90	.120	9.60	4580.83						
227	9/30/82	3197-3206	80.00	21827.90	.050	4.00	4584.83						
230	9/30/82	3207-3216	80.00	21907.90	.070	5.60	4590.43						
231	9/30/82	3217-3225	72.00	21979.90	.060	4.32	4594.75						305943.05
SEPT	TOTALS		2883.30	21979.90	.155	445.60	4594.75	75.25	379.80	2981.75	50382.00	.00	305943.05
232	10/4/82	3226-3235	80.00	22059.90	.060	4.80	4599.55	52.68	432.48	398.30	19933.00	.00	

233	10/4/82	3236-3245	80.00	22139.90	.050	4.00	4603.55						
234	10/5/82	3246-3255	80.00	22219.90	.060	4.80	4608.35						
235	10/5/82	3256-3265	80.00	22299.90	.100	8.00	4616.35						
236	10/5/82	3266-3273	64.00	22363.90	.120	7.68	4624.03						
237	10/6/82	3274-3283	80.00	22443.90	.140	11.20	4635.23						
238	10/6/82	3284-3293	80.00	22523.90	.130	10.40	4645.63						
239	10/6/82	3294-3298	40.00	22563.90	.720	28.80	4674.43						
240	10/7/82	3299-3320	176.00	22739.90	.410	72.16	4746.59						
241	10/7/82	3321-3329	72.00	22811.90	.240	17.28	4763.87						
242	10/8/82	3330-3351	220.00	23031.90	.090	19.80	4783.67						
243	10/8/82	3352-3357	48.00	23079.90	.150	7.20	4790.87						
244	10/28/82							72.19	504.67	416.50	28912.20	.00	.00
OCT	TOTALS		1100.00	23079.90	.178	196.12	4790.87	124.87	504.67	391.17	48845.20	1015880.13	.00
GRAND	TOTALS		23079.90	23079.90	.208	4790.87	4790.87	504.67		344.98	174100.70	1015880.13	321984.60

Supreme Court, U.S.
FILED
JUN 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. . . . .

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

V.

JEFFREY G. BANKS, ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

APPELLANT APPENDIX "B - 2" ASSOCIATES JOINT OPERATING AND MANAGEMENT COMMITTEE AGREEMENTS

W. David Weston
Pro Se
3572 Doverhill Drive
Salt Lake City,
Utah 84121
Phone 801 263 3610

BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

THE TELEGRAPH MINE ASSOCIATES JOINT OPERATING AGREEMENT

Agreement dated as of the day of 1980 by and among Cascade Energy and Metals Corporation, a Nevada Corporation (the "Operating Manager") and each of the Purchasers (the "Purchasers") of the working interests in the property known as the Telegraph Mining Claims (the "Mining Claims"), as more particularly described in Exhibit "A" to the Prime Lease. The parties here to are entering into this Agreement in order to facilitate the development, production and sale of gold and silver and other minerals from the property for their respective separate profit (such entities hereinafter referred to as the "Program"). Each of said purchasers shall execute a counterpart of this Joint Operation Agreement which will be accepted by the

Operating Manager when they have signed said Agreement and returned a copy to the Purchaser of the working interests.

WITNESSETH:

WHEREAS, each Purchaser is the owner of fractional undivided working interests (the "Units") in the Mining Claims (sometimes referred to herein as the "Property") in the amount set forth opposite his name on the signature page hereto, out of an aggregate of 35 Units ; and

WHEREAS, the Program will be engaged in the development of the property and the production of gold and silver and other minerals from the property pursuant to the Sublease from Telegraph Mine Limited, a Utah limited partnership and Rex Montis Silver Company, a Utah corporation, on its own behalf and as general partner of Gold Technics, Ltd., a California limited partnership, (hereinafter collectively referred to as the "Sublessor") a form of which is attached as Exhibit "C" (the "Sublease") to the Confidential Memorandum dated September 15, 1980, offering such working interests (the "Memorandum"); and

WHEREAS, the Sublessor is loaning to the Program $800,000 to provide for the preproduction costs of the development of the property (the "Development Loan"); and

WHEREAS, the purchasers and the Operating Manager desire to provide for the development, exploitation and management of the Property and to make certain provisions as to the rights, privileges and obligations as hereinafter set forth:

NOW, THEREFOR, in consideration of the premises and the mutual covenants and obligations herein contained, the parties agree as follows:

1. **Authority of the Operating Manager.** The purchasers hereby commit to the Operating Manager, and the

Operating Manager hereby agrees to perform, the duties of Operating Manager of the program subject to the terms and conditions as set forth in this Agreement. The operating Manager shall perform such duties for the account of, and for so doing to comply with all agreements, permits, and real ever, to the control and direction of the purchasers as provided for herein on whose behalf such duties are to be performed.

2. **Duties of Operating Manager.** The operating Manger is authorized and instructed on behalf of each o the purchasers to:

(a) Generally oversee the development, maintenance and day-to-day operations of the property and in that regard obtain (i) competent superintendents, engineers and labor and /or on behalf of the Program such Mining Contracts in accordance with the Financial Projections, as contained in the Memorandum; (ii) mining ana other materials, supplies and equipment, all as required for the preproduction, construction and operation of the Program, and enter into contracts as may be necessary i connection therewith:

(b) Carry out or authorize experiments and studies designed to develop efficient and practical methods for producing minerals from the properties:

(c) Oversee the operations and the performance of the Sublessor and contract miners and require that the latter carry a sufficient amount of workmen's compensation insurance an public liability insurance covering the Program and the Purchasers:

(d) Engage and retain attorneys, accountants and such other consultants and accountants and such other consultants and advisors as necessary;

(e) Cause a notice of each the Purchaser's working Interest Agreement with the sublessor to be filed in the

records maintained by the Clerk of the County of San Bernardino;

(f) Cause all necessary reports and other filings to be made as may be necessary in order to comply with the laws having application to the leasing and operations of mineral properties;

(g) Collect and receive the proceeds from the proceeds from the disposition of the minerals extracted from the property giving proper receipts therefor, and pay therefrom all royalties, costs, taxes and such other costs and expenses of the development and operation of the property;

(h) Cause the proceeds of the Development Loan to be used for development costs only and provide for repayment of said Loan subject only to payment of the costs of production royalties and the payments as due pursuant to the Royalty Notes; and

(i) Maintain all funds received in connection with the working interests and not distributed to the Purchasers in a segregated account separate and apart from any other account maintained by the Operating Manager. The account shall be in the name of TELEGRAPH MINING ASSOCIATES.

(j) Explore claims included in the Program.

(k) Sell or dispose of any tools, equipment, supplies and facilities included in the program that may be worn out, obsolete or no longer useful.

3. **The Purchaser's Right to Pro Rata Share of the Minerals.**

(a) Each Purchaser has, and Expressly reserves, the right to his pro rata share of the gold, silver and other minerals mined and removed and milled, and the right, personally to sell or direct the sale thereof for his own benefit upon such terms as he may see fit, receive the proceeds, thereof and to request that instead of sale of said

gold, silver and other minerals, that they be delivered to him in kind. Any additional expenses incurred by reason of the Purchaser's reservation of his pro rata share of the gold, silver and other minerals, including reasonable administration expenses, shipping costs, and storage shall be promptly paid by such Purchaser to the Operating Manager, or credited against the amounts otherwise due him hereunder.

(b) In the event any party shall fail to make the arrangements necessary to take in kind, or separately dispose of its proportionate share of the gold, silver and other minerals produced from the Program, the Operating Manager shall have the right, subject to the revocation at will by the party owning it, but not the obligation, to sell such to others or authorize others to sell it at any time and from time to time, for the account of the nontaking party at the best price obtainable in the area for such production. Any such purchase or sale by the Operating Manager shall be subject always to the right of the owner of the production to exercise at any time its right to take in kind, or separately dispose of, its share of all gold, silver and other minerals not previously delivered to a purchaser. Any purchase or sale by the Operating Manager or by any sales agent of any party's share of gold, silver and other minerals shall be only for such reasonable periods of time as are consistent with the minimum needs of the industry under the particular circumstances, but in no event for a period in excess of one year. Any sales agreements not terminable upon thirty days notice shall be effective only as to the Purchases approving the Agreement, but any sales agreement shall be binding in accordance with its terms on such Purchasers as give their approval.

(c) Subject to the rights set forth in (b) above, the Operating Manager, on behalf of the Purchasers may enter into a Sales Agreement to sell gold, silver and other minerals at the best available price. Said Sales Agreement

will be no longer than one year. The Purchasers will be informed of the terms of the Sales Agreement as soon as available. At the end of the first year, the Purchasers will inform the Operating Manager of their individual desires as to whether the Sales Agreement, if any, should be renewed or another sales agent appointed. If after notice to the Purchasers that a sales agreement will terminate and that a new Sales Agreement is expected to be entered into, the Purchaser does not instruct the Operating Manager as to the disposal of his share of the gold, silver and other minerals, the Operating Manager may enter into a further Sales Agreement for a period of no longer than one year.

4. **Duty of Operating Manager to Develop the Property.** The Operating Manager hereby agrees to perform such duties, using its best efforts, skill and judgment to make all installations necessary to place the Property in a condition to produce ore therefrom. The Operating Manager shall select and utilize employees, experts and advisors as well as mining contractors and/or subcontractors who are competent in their respective fields; the Operating Manager however, does not guarantee results. Such efforts through the expenditure of the pre-production loan amount shall include the following necessary items to place the Property into production as that term is used in the mining industry.

(1) Engineering and geological expenses, surveying, mapping.

(2) Cutting pads for drilling sites, drilling blast holes, blasting and drifting.

(3) Mobilization and rental or purchase of equipment and machinery, and purchase of fuel.

(4) Site preparation, including cutting and grading roads, maintaining access roads.

(5) Blasting and miscellaneous supplies.

(6) Necessary Labor.

(7) Filing necessary reports and applications; payment of required fees and permits.

(8) Insurance.

(9) Office support and general administrative costs.

(10) Per diem covering mileage, fuel, travel, meals and lodging.

5. **Gold and Silver Mining Operations**.

(a) Proposed Operations. Should any party hereto desire to mine any portion of the Property contained in the Sublease other than the portion to be mined by a majority in interest of the Units, or to rework or deepen a mine at the joint expense of all parties or a mine jointly owned by all the parties and not then producing in paying quantities, the party desiring to mine, reopen or deepen shall give the other parties written notice of the proposed operation, specifying the work to be performed, the location, proposed depth, objective formation and the estimated cost of the operation. The parties receiving such a notice shall have thirty (30) days after receipt of the notice within which to notify the parties wishing to do the work whether they elect to participate in the cost of the proposed operation. Failure of a party receiving such notice to reply within the period above fixed shall constitute an election by that party not to participate in the cost of the proposed operation. Any notice or response given by telephone shall be promptly confirmed in writing. Notwithstanding the foregoing, all parties hereto, without further notice to any person, shall be deemed to have consented to the activities described in the Memorandum regarding the Telegraph Mining Associates Program for a period ending one year after the execution of this Agreement.

(b) Operation by Less than All Parties. If one or more of the parties hereto ("Non-Consenting Parties") elects as aforesaid not to participate in a proposed activity, then such of the parties hereto who are not Non-Consenting

Parties shall have the right to conduct the proposed activities in such manner as the Operating Manager deems prudent without interfering with the rights of the Non-Consenting Parties. The Operating Manager shall delineate a portion of the Property as set aside for the Non-Consenting Parties by taking into account the reasonable needs for the proposed activity as well as the interests of the Non-Consenting Parties.

(c) Right to take Production in Kind. Unless he shall have disposed of his gold, silver and other minerals otherwise, each party shall have the right to take in kind or separately dispose of its proportionate share of all gold, silver and other minerals produced from the Property, exclusive of production unavoidably lost. Any extra expenditure incurred in the taking in kind or separate disposition by any party of its proportionate share of the production shall be borne by such party. Any party taking its share of production in kind shall be required to pay for only its proportionate share of such part of the Program's facilities which it uses and any additional expenses incurred by the Program by reason of a Purchasers reservation of his pro rata share of the gold, silver and other minerals, including reasonable administration expenses, cartage and storage, shall promptly be paid by such Purchaser or be credited against the amounts otherwise due him hereunder.

6. **Limitation of Operating Manager's Authority**. Anything herein to the contrary notwithstanding, the Operating Manager is not empowered or authorized to enter into any amendment, modification or termination of the Sublease between the Sublessor and the Purchasers of the Units herein, or to borrow money or execute notes or other instruments of indebtedness binding the Purchasers of the Units without the express concurrence of the Purchasers of said Units; except that they are expressly authorized to borrow $800,000 ($22,857.14 per Unit) on

behalf of the Purchasers from the Sublessor for preproduction development costs at an interest rate of twelve percent (12%) which will be repaid out of the first production of ore from the Property, but will be subordinate to the schedule payments required pursuant to the Royalty Notes due to the Sublessor under the lease. It is further understood that if the interest on the Note is not capable of being paid at the time the loan is repaid, said interest will not accrue additional interest.

7. **Default by Sublessor Under the Prime Lease**. If the Sublessor defaults in its obligations under the Prime Lease, including the making of rental payments or royalties, the Operating Manager will give notice of said default, along with the Sublessor's having given such notice, to each Purchaser. Said Purchaser may pay his proportionate share of the royalties to the Prime Lessors or by making payment through the operating Manager herein, and step into the position held by the Sublessor under the Sublessor's Prime lease. No Purchaser is obligated hereunder to make said payment; but if such payments are not made, it is understood that his working interest may be forfeited. Further, the operating Manager will follow the directions of a Majority -in-Interest in curing defaults not involving the payment or royalties and taking any other action consistent with the terms of that Agreement.

8. **Responsibility of Operating Manager**. The operating Manager shall devote so much of its time and efforts to the performance of its services hereunder as is in its judgment reasonable, necessary and desireable. The Operating Manager may engage in such other business activities as it may, from time, determine, even though such activities may be competitive with those of the Purchasers. The Operating Manager, or persons or entities affiliated with it, shall have the right to perform services for the

Purchasers (other than as required pursuant to this Agreement)and to receive Compensation therefor on terms comparable to those, Purchasers could obtain for such services from nonaffiliated persons or entities.

9. Indemnification of Operating Manager. The Operating Manager shall not be liable to the Purchasers for any act or omission in good faith and within the scope and authority conferred by this Agreement which does not amount to willful misconduct or gross negligence. Each of the Purchasers shall indemnify the Operating Manager, its agents, representatives and assigns against any and all claims, demands, litigations, judgments, costs and expenses (including reasonable attorney fees) asserted against it by or in favor of any person or entity not a party to this Agreement, arising out of or in connection with his performance of the services under this Agreement and resulting from errors in judgment or omissions, whether or not disclosed, unless caused by the willful misconduct or gross negligence of the Operating Manager, provided (i) the Operating Manager shall promptly notify the Purchasers of any claim or litigation to which the foregoing indemnity may be applicable, and (ii) the Operating Manager shall not settle any claim or litigation or confess or consent to entry of any judgment, or willfully default in any litigation, to which the foregoing indemnity may be applicable, except on prior consultation with the Purchasers and the concurrence of the Majority in Interest of them.

10. Compensation and Expenses of Operating Manager. The Purchasers agree that the Operating Manager shall be paid as compensation for his services the sum of the following:

(a) Reimbursement of its out-of-pocket costs of management incurred for the Program which shall include travel expenses and a fair allocation or pro rata share of operating, handling, managing and overhead expenses, in-

cluding expenses for group insurance, safety, hospitalization and retirement, but excluding expenses for any profit-sharing payments.

(b) As compensation in full for all services rendered, the Operating Manager shall receive an Operating Management Fee of five percent (5%) of the gross proceeds of the ore mined and sold, (as that term is defined in Section 3 of the Lease) provided that such amount shall be accrued and become payable to the extent of cash available after payment of other expenses from the mining and milling of said minerals removed from the Property.

(c) The Operating Manager shall be entitled to receive out of production a Construction and Pre-Production development Fee equal to two percent (2%) of all costs incurred in the pre-production development of the Program, to construct and develop the property to the production stage.

(d) At the time each Purchaser executed this Agreement, the Operating Manager shall be paid $800 per Unit for legal, accounting and other services incurred during 1980 in connection with its employment as the Operating Manager; thereafter, it shall charge each of the Purchasers the actual costs incurred for such expenses.

11. Records and Reports. The Operating Manager shall cause accurate books to be kept for each Purchaser, an accurate record of the operation of the Property and all transactions conducted on behalf of the Purchaser. Separate accounts shall be maintained for each Purchaser. Such books of account and other records of the Operating Manager in connection with the Property shall be available to any Purchaser during regular business hours and at such other reasonable times at the offices of the Operating Manager. The Operating Manager will submit to each Purchaser for the mining operations on the Property quarterly reports as to the operation of the mine, as well as annual

reports and information necessary for the Purchasers to prepare tax returns.

12. Transferability of Working Interests. No Purchaser may sell, transfer, assign or otherwise dispose of his interest in the Property other than to a members of his immediate family, except by operation of law:

(a) Without the written consent of the Operating Manager and a Majority-In-Interest of all other Purchasers as defined in Section 23 of this Agreement; and

(b) Unless a registration statement with respect to such working interest(s) has become effective under the Securities Act of 1933 and/or the state securities laws, or the Operating Manager has been furnished with an opinion of counsel satisfactory in form and substance to the effect that such registration is not required.

Provided, however, that it is understood that in the event that any Purchaser defaults in his obligations to the Sublessors may become the owner of such Purchaser's working interest(s).

For purposes of this Agreement, a Purchaser's immediate family shall include his ancestors, issue, siblings, spouse and the spouses of his issue and siblings.

(c) No assignment of any Units by a Purchaser may be made if the Units sought to be assigned, when added to the total of all other Units assigned, would, in the opinion of counsel for the Program, result in the termination of its partnership status under the Internal Revenue Code.

(d) No assignment, sale, transfer, exchange or other disposition of any Units in the Program may be made except in compliance with the provisions of this Agreement and the applicable rules of any applicable governmental authority.

(e) An assignee, when accepted as such by the Program, shall be entitled to receive cash distributions from the Program attributable to the Units acquired by reason of such assignment from and after the effective date of the

assignment of such Units to him; however, anything herein to the contrary notwithstanding, the Program and the Operating Manager shall be entitled to treat the assignor of such Units as the absolute owner thereof in all respects, and shall incur no liability for distributions or transmittal of reports and notices required to be given to Purchasers hereunder which are made in good faith to such assignor until such time as the written instrument of assignment has been received by the Program and recorded on its books and the effective date of an assignment has passed. Provided the Program has actual notice of any assignment of Units, the effective date of such assignment on which the assignee shall be deemed an assignee of record, shall be the last day of the month set forth on the written instrument of assignment.

(f) Any assignment, sale, exchange or other transfer in contravention of any of the provisions of this Section 12 shall be void and ineffectual, and shall not bind or be recognized by the Program.

13. Liability of Purchasers.

(a) The liability of the Purchasers shall be severable, not joint or collective. Each Purchaser shall be responsible only for his obligation as herein set forth, and only for his proportionate share of expenses and obligations in connection with the Property.

(b) All costs and liabilities incurred in the exploration and development of the Property and the mining, milling and removal of ore therefrom shall be borne and paid for by the Purchasers in proportion to their interests.

(c) Notwithstanding anything to the contrary contained herein, the Operating Manager shall have no authority, express or implied to enter into any commitment or obligation on behalf of the Purchasers or otherwise do anything which would subject the Purchasers, or any of them, to any liability in excess of the Purchasers' respective interests in the minerals mined, milled and removed from

the Property and their interest in any proceeds from the sale of said minerals.

14. Terms of Agreement. this Agreement shall remain in full force and effect as to the Program as long as the Lease is continued in force, or any part thereof, unless earlier terminated by the affirmative vote of a Majority-In-Interest of the Purchasers.

15. Actions by the Purchasers. Purchasers owning a majority of the Units shall have the power (i) to direct the Operating Manager as to the conduct of the business of their working interests (ii) to adjust and pass on the Operating Manager's accounting, and (iii) to authorize and direct the Operating Manager in management decisions. Anything herein to the contrary notwithstanding, no Purchaser shall have any right to encumber or dispose of any other Purchaser's interest in the Property or pro rata share of the ore mined, milled and removed from the Property.

16. Tax Returns. The Operating Manager shall cause all necessary tax returns, reports and other filings to be made as may be necessary to comply with the laws applicable to the ownership of the Property for the operation of the Purchasers.

17. Election as to Taxation. The Purchasers of the Units of working interests herein elect under Section 761 of the Internal Revenue Code of 1954 as amended (the "Code") not to be subject to Subchapter K of the Code, and the Purchasers hereby authorize, empower and direct the Operating Manager to cause the filing of an election not to be subject to Subchapter K of the Code in accordance with the Treasury Regulations thereunder. Each Purchaser, by executing this Agreement, agrees not to take any action which would invalidate the election to exclude the working interests, as a group herein, from the provisions of Subchapter K of the Code.

18. Notices. Any notice, request, demand, statement or other communication provided for in this Agreement shall be in writing and shall be deemed to have been duly given or delivered on the day mailed if placed in a postpaid envelope and deposited with the United States mail, certified, return receipt requested, directed to the parties at the address listed after their respective names on the signature page hereto (or such other address of which any party may have given written notice to the others).

19. Benefit. Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, successors, legal representatives and assigns. Nothing contained herein, express or implied, shall be deemed to confer on any person, other than the parties hereto, or their respective heirs, successors, legal representatives or assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

20. Construction. This Agreement shall be interpreted in accordance with the laws of the state of Utah.

21. Meetings. At any time or from time to time, Purchasers owning ten percent (10%) or more of the units may require, by written notice to the Operating Manager specifying in general terms the subjects to be considered, the Operating Manager to call, or the Operating Manager may on its own motion call, a special meeting of the Purchasers; and the Operating Manager within ten (10) days after any such notice is received shall give notice of such special meeting to all Purchasers whose addresses are on record with the Operating Manager, including in such notice a copy of the notice requiring the call. Any Purchaser shall have the right upon notice in writing to require the Operating Manager to furnish by mail a list of the names, addresses and respective interests in the Sublease of all other Purchasers as shown on the records of the Operating

Manager at the time of the notice. Any Purchaser or his representative shall have the right to inspect and copy the names and addresses of all other Purchasers.

22. Gender and Heading. The use of any gender herein shall be deemed to be or include the other genders, and the use of the singular herein shall be deemed to be or include the plural (and vice-versa) wherever appropriate. The paragraph headings herein are inserted only as a matter of convenience and reference and in no way define, affect the meaning or interpretation of, limit, or describe the scope of this Agreement, or the intent of any provisions thereof.

23. Majority-In-Interest. The term "Majority-In-Interest" of the Purchasers as used in this Agreement shall mean a majority of the Units. 24. Arbitration. Any controversy between the parties hereto arising out of this Agreement shall be submitted to arbitration in the County of Salt Lake, State of Utah before any arbitrator or arbitrators chosen in accordance with the rules of the American Arbitration Association.

25. Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

26. Execution in Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if the parties hereto had all signed the same document.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year above written.

SIGNATURES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI

TELEGRAPH ASSOCIATES
RESOLUTION
MANAGEMENT COMMITTEE
AGREEMENT

At the annual meeting of the Telegraph Mining Associates held in Las Vegas, Nevada on the 14th day of August, 1982, upon motion duly made by Bernie Hodowski and seconded by Chris Waugh and carried by a majority of the Associates present, it was resolved that:

WHEREAS, Article 15 of the Telegraph Mining Associates Joint Venture Operating Agreement provided that the Associates owning a majority of the Units shall have the power (i) to direct the Operating Manager as to the conduct of the business of their working interests and (ii) to adjust and pass on the Operating Manager's accounting, and (iii)

to authorize and direct the Operating Manager in management decisions...and;

WHEREAS, a group of the Associates deem it in their collective best interest to elect a Management Committee to represent them in the conduct of the business of their working interests.

BE IT THEREFORE RESOLVED: that the Associates whose names appear as signatories below hereby elect and appoint a Management Committee to consist of the following seven Associates:

Dr. Phillip Bentz, Chairman
Delbert Ashley, Vice Chairman
Herbert Stoltenberg, Secretary
Bernie Hodowski
Chris Waugh
Joseph Green
Lowell Smith

and that said Management Committee shall be vested with such power of attorney and shall manage and conduct its affairs as set forth below.

NOW THEREFORE, on this 14th day of August, 1982, it is mutually agreed by and between the Associates (hereinafter called "The Associates"), whose names and signatures appear hereafter, as follows:

1. The Associates hereby agree to elect and appoint a Management Committee to consist of seven (7) persons. The Management Committee members shall be elected and qualified each year at an annual meeting of the Associates by majority ballot of the Associates. A Chairman, Vice Chairman and Secretary - Treasurer shall be appointed by and from among those so elected. Until their successors are duly elected and qualified, the Management Committee

hereby appointed shall be those Associates elected by the foregoing resolution made on the 14th day of August, 1982.

2. The Associates hereby constitute and appoint and by these presents do hereby make, constitute and appoint the Management Committee their true and lawful attorneys, for themselves, and in their name, and on their behalf to (i) direct the Operating Manager of the Telegraph Mine as to the conduct of the business of the working interests of the Associates, (ii) to adjust and pass on the Operating Manager's accounting, and (iii) to authorize and direct the Operating Manager in management decisions, and (iv) to authorize expenditures of the Associates in carrying out the agency created by this agreement and power of attorney. Notwithstanding anything herein to the contrary, no committee member or a majority of the Management Committee or the Management Committee as a whole shall have any right to encumber or dispose of any Associates interest in the Telegraph Mine property or pro rata share of the ore mined, milled and removed from the site of deposition on the property.

3. The Management Committee, nor any member thereof, shall not be responsible or liable for any assessments made to any Associate.

4. Under provision of Article 21 of the Joint Operating Agreement, the Management Committee shall call an annual meeting of the Associates, for the purpose of electing members of the Management Committee and of exercising and discharging any other powers or duties vested by this agreement or the Joint Operating Agreement. The Management Committee may call special meetings of the Associates at any time in accordance with the terms of the Joint Operating Agreement. At all meetings of the Management Committee or the Associates, the Chairman of the Management Committee shall preside. At any meeting of the Associates, annual or special, each Associate shall

be entitled to vote his respective interest in the Telegraph Mine Sublease.

5. At all times, the Management Committee agrees to conduct its affairs in accordance with the terms of the Joint Operating Agreement.

6. The death, incapacity, resignation or removal of a member of the Management Committee shall not terminate this Agreement or power of attorney. Any vacancy among the committee shall be filled by an Associate nominated and appointed by the remaining committee members for the unexpired portion of such term.

7. Regular meetings of the Management Committee shall be held at such times as they may from time to time fix, and they may hold meetings at any time for the transaction of any business upon the call of any member of the committee or any of the Associates. The Chairman, or in his absence, the Vice Chairman, shall preside at such meetings, and the Secretary of the committee shall take minutes of the proceedings and shall file a copy of all minutes so taken with the Operating Manager for permanent safekeeping. A majority of the committee shall constitute a quorum. A vote of the majority of the committee shall be required for affirmative action. Any Associate may attend and participate in such meetings. Notice of meetings in accordance with the Joint Operating Agreement, shall be sent to all parties to this agreement. A waiver of notice of meetings, whether regular or special, may be signed by all members of the Management Committee and thereby consent to the transaction of any business that may come before the committee at the said meeting.

8. The Management Committee is hereby authorized to receive such compensation, regular or special, and/or reimbursement of expenses, as they shall deem reasonable and proper. It is expressly agreed that any costs incurred by the Operating Manager in complying with any

special requests of the Management Committee shall be born proportionally by the Associates.

9. No member of the Management Committee shall be liable for any act or omission whatsoever of any other committee member or ASsociate; nor shall any committee member be liable for any negligence, error or judgment, or for any act or omission except for his own willful breach of trust and agency. No committee member shall be required to give any bond or surety to secure the performance of this agency.

10. Each of the members of the Management Committee and the Operating Manager shall be indemnified by and reimbursed by the Associates for any personal liability, expense or loss, or damage incurred or suffered, including liability, loss or damage resulting from Torts, in the administration of or enactment of the agency created hereby.

11. This Agreement shall not create any partnership relationship between the Associates or the members of the Management Committee. It is expressly agreed that in the event this agreement were to be construed by the Internal Revenue Department of the United States to create a relationship among the Associates other than that of each Associate being treated as if engaged separately in a trade or business with respect to his working interest in the Telegraph Mine Sublease, then this agreement is to be null and void.

12.. This Agreement may be executed in multiple copies, each of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Associates affix their hand and seal the day and year first above written.

THE ASSOCIATES

Supreme Court, U.S.
F I L E D
JUL 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner,

v.

JEFFREY G. BANKS, et al.
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Respondents

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QUESTIONS PRESENTED

The questions presented for review as set forth by the petitioner, are as follows:

1. May the appellate court find that a lower court's decision was not clearly erroneous when the lower court's decision was based upon a conclusion of law which the appellate court correctly overturned, and may the appellate court then make new findings of fact as a sole basis for upholding the trial court's decision which new findings were contrary to the trial court's findings and the record?

2. May the appellate court make it's [sic] own findings of fact on a critical issue where such findings are contrary to the findings of the lower court and the record?

3. May the appellate court correctly make a conclusion of law in interpreting a contract critical to a determination of the case which conclusion is contrary to the conclusion of law of the trial court and not find the trial court's conclusion clearly erroneous?

4. After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, did the appellate court then err in further failing to determine that the district court's findings were clearly erroneous where the district court, to the contrary, found that the plaintiff wrongfully assessed the defendants and therein breached its fiduciary duty to the defendants and acted in bad faith?

PARTIES TO THE PROCEEDINGS

1. Weston and his Affiliated Entities

Cascade Energy & Metals Corporation, a Nevada Corporation
Gnolaum Unitrust, James F. Peters, Trustee
Gold Technics, Ltd., a limited partnership
Interphase Corporation
Rex Montis Silver Co.
Telegraph Mine Joint Venture

2. The Associate Defendants

Jeffrey G. Banks
Kenneth Caldwell
Coastal Computer Investments
Elmer J. Davis
David G. Henry
Roger A. Mann
Mann Caldwell Partnership
Robert A. Nickerson
Peter P. Samarin
Patricia Stoltenberg
Herbert W. Stoltenberg
Edwin Stoltenberg
Delford Ashley
George Slater
Patricia Slater
Robert Doub
Sam Hambarian
Alyce Hambarian
Lionel Ascher

3. The Gold Technics Defendants

Samuel Harmatz

Bernard Hodowski
A. C. Nejedly
Chris Waugh
H. E. Moses, D. D. S.
R. E. Donahey
Grace V. Duncan
Elliot Weinberg
Harmatz & Hodowski,
a partnership
Gold Technics, Ltd.

4. Amici Curiae

Harold Masunaga
Marion Harada
Ukio Ayabe
Lyle Muller
Charles Higashi
Joseph Green
William Ohara

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported as Cascade Energy & Metals Corporation v. Banks, 896 F.2d 1557 (10th Cir. 1990).

JURISDICTIONAL STATEMENT

The petition in this case should be dismissed as not being within the jurisdiction of the Court. The petition was not timely filed in conformity with Supreme Court Rule 13.4.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1). Pursuant to 28 U.S.C. §2101(c), the time to petition for certiorari is 90 days after entry of the judgment. Supreme Court Rule 13.4 provides that if a petition for rehearing is timely filed in the lower court, the time for filing a petition for a writ of certiorari runs from the date of denial of the petition

for rehearing. The timeliness of the petition thus hinges on the date the petition for rehearing was filed in the court below.

The judgment of the Tenth Circuit Court of Appeals was entered on February 16, 1990. Tenth Circuit Rule 40.3 provides that the time for filing a petition for rehearing is 14 days. On March 12, 1990, the Tenth Circuit granted petitioner an extension until March 16, 1990 to file a petition for rehearing.

A petition for rehearing was not filed in the court of appeals until March 23, 1990. On April 25, 1990, the petition for rehearing was denied. Since the petition for rehearing was untimely, the 90-day period for filing a petition for writ of certiorari expired

on May 15, 1990, 90 days after entry of the judgment on February 16.

STATEMENT OF THE CASE

The material facts of this case, derived from the decision of the court below, Cascade Energy & Metals Corporation v. Banks, 896 F.2d at 1557, are set forth below because of numerous inaccuracies, misleading statements and misstatements and matters outside of the record contained in the petition.

In December, 1980, the petitioner, W. David Weston ("Weston"), a promoter in Salt Lake City, Utah, sold 35 sublease interests in mining claims known as the Telegraph Mine, to various investors, including respondents. As part of the transaction, the investors agreed to hire Cascade Energy and Metals Corporation ("Cascade"), whose president

was Weston, to develop and operate the mine.

The sale raised $1.05 million, of which $800,000 was loaned back to the investors as a development loan. Cascade, acting as the project manager, was to use the $800,000 to develop the mine and prepare the site for gold production. By July 1981, Weston and Cascade knew that the $800,000 was not sufficient to put the mine into production. They concealed this fact and, when the $800,000 loan ran out, embarked upon a scheme to squeeze additional money out of the investors.

Initially, Weston tried to coax the investors into voluntarily contributing additional capital to the project. But in late 1982, having achieved little success with this approach, Weston claimed that the Joint Operating

Agreement authorized Cascade to make mandatory assessments against the investors for additional capital contributions.

On December 17, 1982 Cascade filed suit in the United States District Court for the District of Utah, against the investors who refused to pay the assessments. The investors counterclaimed against Cascade and brought third-party claims against Weston and affiliated entities for fraud, breach of fiduciary duty and securities violations.

At trial, the attorney who drafted the Joint Operating Agreement testified unequivocally that the program was not assessable, and the trial court so found. The trial court also found that Weston and entities controlled by him misappropriated or otherwise failed to

account for $629,474.63 belonging to the joint venture and converted 35,000 shares of stock, which were held in trust. The court held that (i) the Joint Operating Agreement did not require the investors to make additional capital contributions, (ii) Weston and Cascade breached fiduciary duties to the investors by learning that the mine could not be put into production for $800,000, concealing that fact, and then attempting to make assessments to raise additional capital, and (iii) the suit was without merit and had been brought in bad faith.

Based on its findings and conclusions, the trial court entered judgment against Cascade and Weston (i) requiring them to account for $629,474.63 in misappropriated funds, (ii) ordering restitution of $70,449.68

in assessments wrongfully collected from the investors, and (iii) awarding the investors $265,000 in attorneys' fees.

On February 16, 1990, the Tenth Circuit entered its decision upholding the trial court's findings and affirming its judgment against Weston and Cascade in all material respects.[1] Weston filed an untimely petition for rehearing, which was denied by the court below on April 25, 1990. He then filed a petition for a writ of certiorari.

INACCURACIES, MISLEADING STATEMENTS AND MISSTATEMENTS OF FACT IN THE PETITION

The various questions raised by the petition all turn on findings made by the trial court which were affirmed by

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[1] On remand, the trial court was ordered to reduce the amount of the judgment against Cascade and Weston for misappropriation from $629,474.63 to $464,474.63.

the court of appeals. Many of petitioner's factual claims are so frivolous that they do not merit mention, much less refutation. Two examples are sufficient to show the Court the breadth of petitioner's distortions and misstatements of fact.

First, petitioner incorrectly maintains that the court of appeals "overturned" the district court on the issue of assessability and proceeded to make "new findings" not supported by the record. (Petition, pp. 8-14, 17-18, 40-41). On the contrary, the courts below were in complete accord. Both the district court and the court of appeals held that the Joint Operating Agreement between Cascade and the investors did not require the investors to make additional capital contributions for development and production costs. (896

F. 2d at 1568) The court below found that the Joint Operating Agreement was "clear on its face" on this point. (Id at 1568-69).

Second, petitioner repeatedly makes exaggerated, misleading and unsubstantiated claims as to the value of the mine and the viability of the project. (Petition, pp. 6, 10, 12, 13-14). The trial court made no findings on these matters. On the contrary, the trial court found that (i) the venture may have been destined to fail from the outset due to its complicated structure, (ii) the $800,000 development loan was not sufficient to get the mine into production, (iii) additional capital was required to make the project succeed, (iv) under a different organization, contract, management, royalty, cost or financing structure the property might

have been operated at a profit, and (v) Weston acted in bad faith by trying to squeeze additional money from the investors from a project he knew was not economically feasible. (Dist. Ct. Amended Finding No. 116[2]; 896 F.2d at 1569). Finally, from an isolated quote from the trial judge, petitioner attempts to transmogrify a "double negative" into an affirmative finding of viability. The judge merely stated that "I cannot find and have not found that the Telegraph Mine project with adequate financing... could not be economically viable." (Petition, p. 24) (emphasis added).

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[2]The trial court's amended findings were reprinted in Appendix "A-2" accompanying the petition.

SUMMARY OF ARGUMENT

Certiorari should be denied in this case for the following reasons:

1. The petition is jurisdictionally defective;

2. The court below gave full consideration to the issues and decided them correctly;

3. Petitioner has misstated and misrepresented essential facts;

4. The issues are not sufficiently important to warrant this Court's review;

5. A review by this Court would involve only questions of fact and the findings below are supported by substantial evidence; and

6. The facts are peculiar to this case and not likely to recur.

ARGUMENT

Certiorari should be granted only when there are "special and important reasons therefor." Sup. Ct. R. 10.1, Rice v. Sioux City Park Memorial Cemetery, 349 U.S. 70, 73-74 (1955). There is no good reason in law or fact to review this case.

The most obvious reason that certiorari should be denied is because the petition was filed out of time. Rehearing was not timely sought in the court below. See Jurisdictional Statement, supra. The time limits fixed by statute and this Court's rules are treated as jurisdictional in ordinary circumstances. See, e.g., Deal v. Board of Education, 402 U.S. 962 (1971) (denying certiorari); Teague v. Regional Commissioner of Customs, 394 U.S. 977 (1969) (denying certiorari); FTC v.

Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) (dismissing writ); Parker v. People of State of Illinois, 333 U.S. 571 (1949); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923). Cf. Sup. Ct. R. 13.3 (clerk "will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time").

This case is not appropriate for review by this Court because it presents only the question of whether the court below erred in its appraisal of the facts in the record. The petition merely requests this Court to second-guess the lower court on its interpretation of a private contract. In essence, petitioner seeks to have this case reviewed because he disagrees with the interpretation of a contract adopted by the lawyer who drafted it,

the trial court which heard the evidence, and the court of appeals which reviewed it.

The questions petitioner raise are unique to the specific contract involved and are of interest only to the parties to it. This case does not in any sense broadly concern federal mining law, the federal rules of evidence, standards of appellate review or other matters of general interest. The issues are unlikely to recur and are too narrow to warrant review by this Court.

This case involves only issues of contract interpretation grounded on disputed testimony. The case was decided by the lower courts on substantial evidence whose admissibility was not challenged. This Court's main task is to settle legal issues, not factual ones. Petitioner asks this

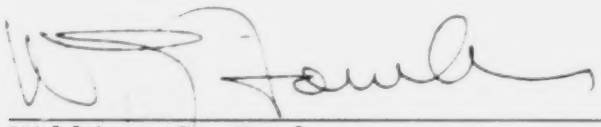
Court to make a third review of the evidence to see if it can find what two previous courts were unable to find--proof that the Joint Operating Agreement allowed Cascade to assess the investors for production costs. This Court has noted that such fact review is not a proper basis for certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

CONCLUSION

Petitioner has wholly failed to sustain his burden under Rule 10.1 of establishing that there are special and important reasons why a writ of certiorari should be granted. The petition should be denied as frivolous

and for lack of jurisdictional requirements, with costs and damages assessed against petitioner.

DATED this 26 day of July, 1990.



William G. Fowler
Counsel of Record for
Respondents

APPENDIX

Tenth Circuit Rule 40.3

Time for filing. In all civil cases in which the United States, or an agency or officer of the United States, is a party, the time for requesting rehearing or suggesting rehearing en banc shall be 45 days after entry of judgment. In all other cases petitions for rehearing or suggestions for rehearing en banc shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing or suggestion for rehearing en banc may be shortened by order of the court, but will not be extended except for good cause shown.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cascade Energy & Metals Corporation v.
Jeffrey G. Banks, et al.

(Nos. 86-1156, 86-1157, 86-1202)

JUDGMENT
Entered February 16, 1990

Before, McKAY, BARRETT, and EBEL, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part. The judgment is reversed in part.

The cause is remanded to the United States District Court for the District of Utah to enter judgment in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cascade Energy & Metals Corporation v.
Jeffrey G. Banks, et al.

(Nos. 86-1156, 86-1157, 86-1202)

ORDER
Filed March 12, 1990

Before McKAY, BARRETT and EBEL, Circuit Judges.

This matter comes on for consideration of W. David Weston's motion for extension of time for filing a petition for rehearing.

Upon consideration whereof, the motion is granted. The petition for rehearing shall be filed in this court on or before March 16, 1990.

Entered for the Court

/s/ Robert L. Hoecker, Clerk
ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cascade Energy & Metals Corporation v.
Jeffrey G. Banks, et al.

(Nos. 86-1156, 86-1157, 86-1202)

ORDER
April 25, 1990

Before McKAY, BARRETT and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing filed March 26, 1990.

Upon consideration thereof, the petition is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

AUG 29 1990
JOSEPH F. SPANIOL, J
CLERK

No. 90 - 81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner

V.

JEFFREY G. BANKS, ET AL.
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. David Weston
Pro Se
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Salt Lake City,
Utah 84121
Phone 801 263 3610

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REPLY TO RESPONDENTS' OPPOSITION TO JURISDICTION

The Respondents oppose jurisdiction claiming appellant's Petition for Rehearing in the lower court was not timely filed in conformity with Supreme Court Rule 13.4. Rule 40.3 of the Rules of Court for the United States Court of Appeals for the Tenth Circuit provides in pertinent part:

> "...petitions for rehearing... shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing ...may be shortened by order of the court, but will not be extended except for good cause shown." (emphasis added)

The lower appellate court extended appellant's time for filing his Petition for Rehearing to March 23, 1990 "for good cause shown" pursuant to appellant's motion to accept filing and accompanying affidavit. The lower appellate court accepted appellant's petition as timely filed when they first considered and acted on appellant's Petition and by denying the Petition on April 25, 1990.

Appellant timely filed his brief for rehearing with the lower appellate court on March 16, 1990. Appellant was later informed by the Clerk of the Appeals Court that appellant's brief did not constitute a "petition" and appellant could file a petition for rehearing with a motion for leave to file the petition out of time. Petitioner's motion to have the petition filed out of time was granted. On April 5, 1990 Petitioner also filed a motion with the lower appellate court for leave to file a supplemental memorandum in support of appellant's petition for rehearing. On April 17, 1990 the lower appellate court granted the appellant's motion to file his supplemental memorandum and thereafter denied the petition on April 25, 1990.

Pursuant to Supreme Court Rule 13.4 the appellant's petition for rehearing was timely filed where the lower appellate court extended the appellant's time for filing pursuant to it's rule 40.3 for "good cause shown."

REPLY STATEMENT

The Respondents' opposition brief contains innuendo and character assassination to distract the Court from observing that the Respondents have avoided responding to the questions presented by the Petition. These questions identify irreconcilable inconsistencies between the legal conclusions of the District Court and the Appellate Court. These inconsistencies in law and fact strike at the very heart of this case - the issue of bad faith - based upon a legal interpretation of a contract. Such inconsistencies between courts within the judicial review process should not be allowed to stand nor should the injustice inherent in such inconsistencies be allowed to go unnoticed or uncorrected.

Rule 15.1 of the Supreme Court Rules states in relevant part:

> "A brief in opposition to a petition for a writ of certiorari... in addition to other arguments for denying the petition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted."

The Reply brief of the Respondents did not address the facts and issues of law set forth in Petitioners Petition as identified below as specified by Rule 15.1. Accordingly none of the arguments of the Respondents should stand as a basis for denying Petitioners Writ of Certiorari.

The Respondents did not address the first issue as to whether an appellate court can make a conclusion of law

diametrically opposed to the decisive conclusion of law made by the District Court upon which the case turns and not then find that the conclusion of law found by the District Court is clearly erroneous. The Respondents did not deny or refute the Petitioner's argument that the district court's conclusion of law that "The interests of the Associates in the sublease and claim were not assessable..." (D.C. Conc. of Law No. 7) was contrary to conclusion reached by the appellate court.

Nor did the Respondents deny that the appeals court found that the interests of the Associates were assessabile when it found "the Associates were required to pay additional development and production costs out of their share of the contemplated gold production." Cascade v Banks 896 F.2d 1557, 1568.

Petitioner similarly argued before the District Court and the Appeals Court that the Associates were required to pay additional production costs out of their share of the contemplated gold production i.e. Associates were responsible for the costs of production up to the value of the recoverable gold contained in the ore that was first mined, milled and removed for final gold extraction.

Respondents did not address the other issue raised to this Court as to whether the appeals court can make new findings of fact which are contrary to the findings of fact made by the District Court and which new findings are contrary to the record submitted to the Court.

The Respondents did not challenge the district courts acceptance of the reports of the geologists who testified that the Telegraph Mine project was economically viable with adequate financing. The Respondents did not deny that the district court also found from the expert's testimony that the mine property does contain extensive deposits of ore and that the property might have been operated at a profit from the gold and silver produced

during the participation of the defendant associates. (D.C. Trial Transcript March 27, 1985, p. 244 and Finding 116, p. 100.)

The Respondents did not deny the fact that the distric court's findings, based on the evidence, identified that production did not start until April 1982 following the completion of development work. The Respondents also did not deny or refute the fact that the record before the court established that by October 1982, 23,080 tons of ore had been mined, crushed, agglomerated and removed to a leach pile for gold extraction from which 504.67 ounces of gold had been removed worth $175,233.87. 4790.87 ounces of gold remained under continuous process of gold extraction which had a "contemplated" extraction value of $1,015,880 (gold at $344.98 pr/ounce). These facts are all contrary to the new findings of the appellate court.

Nor did the Respondents address or refute the fact that the appeals court made a contrary finding that no gold was produced at all (Cascade v Banks, supra, pgs. 1565, 1566, 1569, 1570) and in particular erroneously found that during the period of development gold should have been produced, but wasn't, when in fact no gold was intended or contemplated to be produced during this period of development by anyone. On the basis of this contrary finding the appeals court then made it's own new finding that since no gold was produced no additional assessments for production expenses could be made and accordingly any assessments made were made in bad faith.

The Respondents brush aside the questions presented to the Court by making untrue character assassinations which are not relevant to the questions presented. i.e. "Weston, a promoter in Salt Lake City, Utah, sold 35

sublease interests...";[1]" Weston.. .misappropriated $629,474.63..."[2] All the other allegations of the Respondents in their statement of the case turn on the questions before this Court. The Tenth Circuit Court's interpretation of the Associates contract that: "the Associates were required to pay additional development and production costs out of their share of the contemplated gold production"[3] is correct. Accordingly, there was no scheme to obtain additional money, Cascade was authorized to make assessments, no restitution of $70,449.68 is warranted, neither Cascade or Weston acted in bad faith and the objectives of the parties to the agreements were realistic and could be realized.

REPLY ARGUMENT

A. CONTRARY TO THE RESPONDENTS ASSERTIONS OF ACCORD THE LOWER COURTS TOOK OPPOSING ROUTES TO ARRIVE AT THEIR FINAL CONCLUSIONS AND THE ROUTES ARE NOT ONLY DISCORDANT BUT THE CONCLUSIONS DO NOT HARMONIZE.

1 Nowhere in the D.C. Findings is Weston identified as the promoter of the project. The D.C. Found that Defendants Harmatz and Hodowski originated the sublease concept (Finding 25) and sublease sales were principally made by Harmatz & Hodowski (Finding 41).

2 On remand the $629,474 was reduced to $464,474. Only $46,474.63 was at issue where the Gold Technics Defendants only owned 10% of the Telegraph Mine Joint Venture. At trial the Joint Venture argued that the Gold Technics Defendants had recieved either an offsetting loan or capital distribution of $40,949 and the parties owning 90% were entitled to offset the amount of $409,490. On remand the appellate court ordered that the Gold Technics Defendants account for and return these funds. Upon return of the Gold Technics amount the only amount unnaccounted would be $5,498.00 (10% of difference $464,474/$409,490) which the Joint Venture and Weston still dispute.

3 Cascade v Banks, 896 F.2d 1557, 1568

Justice is not served when the lower court's decisions are in conflict and do not harmonize either their conclusions of law or findings on the same or similar subjects. The resulting wrong is discordant and blatant and requires justicial resolution.

B. THE TRIAL COURT MADE CLEAR FINDINGS AS TO THE VALUE OF THE MINE AND THE APPELLATE COURT IGNORED THOSE FINDINGS, THE RECORD AND MADE NEW FINDINGS WHICH WERE UNSUPPORTED.

The Respondents' assert the District Court's findings of economic viability were misleadingly referenced by Petitioner though given some credence by Respondent's brief. Contrary to Respondent's assertion on page 9 that "the trial court made no findings (regarding mine value or project viability)," the trial court did make such findings particularly where it held against the Respondent/ Defendants in finding the $2,600,000 annual royalty (rental) to be paid by the sublessees for the mine property was not excessive. This finding denied the counterclaim of the Respondent/ Defendants who prayed the lower court would find the rental amount unconscionable. (See D.C. Findings No. 10 and 128).

Further, the district court in it's decision to bypass the remedy of forfeiture occasioned by the Respondent/Defendant's default reaffirmed it's opinion as to the value of the mine property by alternatively requiring the Telegraph Mine Joint Venture to purchase the defendant's sublease and 50% sublease interest for the set price of $2,411,200 and in additionally requiring the Respondent/ Defendants to forfeit $1,050,000 of the cash they had in-

vested.[4]

The main body of Respondent's arguments regard mere suppositions of the trial court such as "may have been destined to fail" or "might have been operated at a profit." These negative suppositions rest squarely on the question of adequate financing of production costs, which the appeals court found was provided for in the contract documents.

> "In our view, paragraphs 13(b) and 13(c), when read together, provided that the Associates were required to pay additional development and production costs..." Cascade v Banks 896 F.2d 1557, 1568.

As a result of the correct appellate court's contract interpretation the district court's suppositions become positive demonstrations that the contracts provided adequate financing as understood by all participants. Accordingly, the project was economically viable and would have produced a profit during the tenure of the Defendant Associates as found by the trial court (Finding 116) if they had just met their contractual obligations to pay their fair share of the production expenses.

Finally, the deposition of the attorney who assisted in drafting the joint operating agreement introducted at trial demonstrates that he confused the unique characteristics of the Telegraph associate's agreement with other similar agreements for which he was solely responsible and he erred in his non-assessability statement. Whether he erred or not is immaterial to the questions before this Court regarding the inconsistencies between the appellate court's

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4 As to the lease interest of Gold Technics the Court set the price at $100,000 plus $52,450.72 and 450,000 shares of Rex Montis stock. As to the sublease purchase $1,548,750 of royalty notes and $400,000 of development notes were forgiven plus $70,000 and 240,000 in cash was required to be paid.

contrary conclusions of law and findings and that of the trial court.

SUMMARY

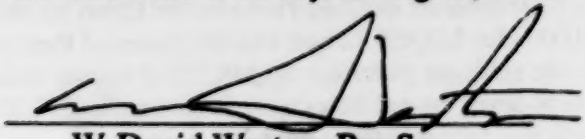
1. The Respondents have failed to address the questions of law and fact presented by the Petitioner. Accordingly the Petitioners fact and argument should be upheld as uncontested and the Petition for Writ of Certiorari should be granted.

2. The question of whether an appellate court can make conclusions of law which are contrary to and overturn the trial court's conclusions and then not find the trial court's conclusions clearly erroneous is of sufficient import in the interest of justice to warrant this Court's attention.

3. The question of whether an appellate court can make new findings of fact which are contrary to the district court's findings and the record in order to arbitrarily support it's opposing conclusions of law in order to arrive at a result similar to the trial court's is a sufficiently blatant miscarriage of the duties and responsibilities of an appellate court as to warrant this Court's scrutiny.

4. Questions regarding justicial miscarriage of duty and responsibility in the lower courts are proper issues to be reviewed by the Supreme Court. This Court has the proper duty to supervise, maintain standards and set in order the judicial system when the systems strays from its appointed duty as demonstrated by the Petitioner in the questions and issues presented to this Court.

DATED this 27th day of August, 1990



W. David Weston, Pro Se